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A

MANUAL OF PRACTICE

IN THE COURTS OF THE

UNITED STATES.

Embracing the Provisions of the Constitution, the Revised Statutes and Amendments thereto relating to Federal Courts, together with the Rules promulgated by the Supreme Court of the United States.

WITH NOTES OF DECISIONS.

BY

ROBERT DESTY,

ATTORNEY AT LAW.

NINTH EDITION.

Revised and brought to date, with the addition of the Rules of the Circuit Courts of Appeals, the Bankruptcy Act, and General Orders in Bankruptcy.

BY

M. A. FOLSOM,

ATTORNEY AT LAW.

TOGETHER WITH A VOLUME OF FORMS,

Adapted and Referring to this Manual.

BY

C. H. TEBBS.

Attorney at Law, and Solicitor of the Supreme Court of Judicature, England.

THE WHOLE IN FOUR VOLUMES.

VOL. II.

SAN FRANCISCO:

BANCROFT-WHITNEY CO.

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CHAPTER XI.

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§ 189. **Number of justices.**—The supreme court of the United States shall consist of a chief justice of the United States and eight associate justices, any six of whom shall constitute a quorum. (Rev. Stats. sec. 673.)

§ 190. **Precedence of the associate justices.**—The associate justices shall have precedence according to the dates of their commissions, or, when the commissions of two or more of them bear the same date, according to their ages. (Rev. Stats. sec. 674.)

§ 191. **Vacancy in the office of chief justice.**—In case of a vacancy in the office of the chief justice, or of his inability to perform the duties and powers of his office, they shall devolve upon the

associate justice who is first in precedence, until such disability is removed, or another chief justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of chief justice. (Rev. Stats. sec. 675.)

§ 192. **Salaries of judges.**—The chief justice of the supreme court of the United States shall receive the sum of ten thousand five hundred dollars a year, and the justices thereof shall receive the sum of ten thousand dollars a year each, to be paid monthly. (Rev. Stats. sec. 676.)

§ 193. **Clerk, marshal, and reporter.**—The supreme court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions. (Rev. Stats. sec. 677.)

§ 194. **Deputies of the clerk.**—One or more deputies of the clerk of the supreme court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name, until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties in his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasance committed af-

ter his death as the clerk would be entitled to if the same had occurred in his lifetime. (Rev. Stats. sec. 678.)

§ 195. Records of the old court of appeals.—The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the supreme court, who shall give copies thereof to any person requiring and paying for them in the manner provided by law for giving copies of the records and proceedings of the supreme court; and such copies shall have like faith and credit with all other proceedings of said court. (Rev. Stats. sec. 679.)

§ 196. Marshal of the supreme court.—The marshal is entitled to receive a salary at the rate of three thousand five hundred dollars a year. He shall attend the court at its sessions; shall serve and execute all process and orders issuing from it, or made by the chief justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the chief justice, he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade. (Rev. Stats. sec. 680.)

§ 197. Duties of the reporter.—The reporter shall cause the decisions of the supreme court made during his office to be printed and published with-

in eight months after they are made; and within the same time shall deliver three hundred copies of the volumes of said reports to the secretary of the interior. And he shall, in any year, when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver, in like manner and time, three hundred copies. (Rev. Stats. sec. 681.)

§ 198. **Reporter's salary and price of reports.**—The reporter shall be entitled to receive from the treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of twelve hundred dollars when, by direction of the court, he causes to be printed and published, in any year, a second volume. Said reporter shall be annually entitled to clerk-hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars. (22 U. S. Stats. 219.) The volumes of said reports shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and the number of volumes now required to be delivered to the secretary of the interior shall be furnished by the reporter without any charge therefor. (Act of Feb. 12, 1889, ch. 135, sec. 2; 1 Supp. 374.)

CHAPTER XII.

SUPREME COURT—SESSIONS.

§ 199. Terms.
§ 200. Adjournment for want of a quorum.
§ 201. Preparatory orders made by less than a quorum.

§ 199. **Terms.**—The supreme court shall hold at the seat of government one term annually, commencing on the second Monday in October, and such adjourned and special terms as it may find necessary for the dispatch of business; and suits, proceedings, recognizances, and processes pending in or returnable to said court shall be tried, heard, and proceeded with as if the time of holding said sessions had not been hereby altered. (Rev. Stats. sec. 684.)

§ 200. **Adjournments for want of quorum.**—If at any session of the supreme court a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If the quorum does not attend within said twenty days, the business of the court shall be continued over till the next appointed session; and if during a term after a quorum has assembled less than that number attend on any day, the justices attending

may adjourn the court from day to day until there is a quorum, or may adjourn without day. (Rev. Stats. sec. 685.)

§ 201. **Preparatory orders made by less than a quorum.**—The justices attending at any term when less than a quorum is present may, within the twenty days mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to the hearing, trial, or decision thereof. (Rev. Stats. sec. 686.)

CHAPTER XIII.

SUPREME COURT—JURISDICTION.

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§ 202. Original jurisdiction.—The supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against embassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations, and original, but not exclusive, jurisdiction of all suits brought by embassadors, or other public ministers, or in which a consul or vice-consul is a party. [See secs. 4063-4066.] (U. S. Const. art. iii, sec. 2, cl. 2; Rev. Stats. sec. 687.)

Note.—See Fowler v. Lindsey, 3 Dall. 411; Marbury v. Madison, 1 Cranch, 137; Cohens v. Virginia, 6 Wheat. 264; Osborn v. Bank, 9 Wheat. 738; Florida v. Georgia, 17 How. 478; Kentucky v. Dennison, 24 How. 66; Mississippi v. Johnson, 4 Wall. 475; Pooley v. Luco, 76 Fed. Rep. 146.

Jurisdiction of supreme court in general.—The supreme court has no jurisdiction except that given by the Constitution or laws of the United States. (Ex parte Bollman, 4 Cranch, 75.) An action without the limits prescribed is coram non judice, and its action a nullity. (Rhode Island v. Massachusetts, 15 Peters, 233; S. C., 12 Peters, 657.) A proceeding to obtain a mandamus is an action at law between the parties, and is not regarded as a prerogative writ. (Com. v. Dennison, 24 How. 66; Com. v. Boutwell, 13 Wall. 526.) The supreme court has no original jurisdiction where a private person, an alien, seeks to obtain redress for a wrong done him by another private person, who is a citizen. (Ex parte Barry, 2 How. 65.) So an indictment against a private person for an insult upon an embassador or public minister is not a case affecting such embassador or minister. (U. S. v. Ortega, 11 Wheat. 467.) In the absence of any legislation of Congress as to the process and mode of procedure where the supreme court has original jurisdiction, the court itself may prescribe the mode and form of procedure. (Florida v. Georgia, 17 How. 478; Chisholm v. Georgia, 2 Dall. 419; New Jersey v. New York, 5 Peters, 284; Com. v. Dennison, 24 How. 66.) In cases tried by the supreme court, if for any reason justice requires it, the supreme court may simply reverse and direct a new trial, although there are no findings of fact or agreed statements (City of St. Louis v. Western Union Tel. Co., 148 U. S. 92).

This section defines the original jurisdiction of this court, and designates the subjects for its exercise where a State is complainant. (Wisconsin v. Pelican Ins. Co., 127 U. S. 265.)

Where State is party.—The original jurisdiction of the supreme court refers to cases in which an original suit might be instituted in the Federal courts, and not to cases between a State and its citizens, or

where a State is enforcing its penal laws. (Cohens v. Virginia, 6 Wheat. 264.) It must be a case in which the State is either nominally or substantially a party (Fowler v. Lindsey, 3 Dall. 411); it must be a party on the record. (Bank v. Planters' Bank, 9 Wheat. 904.) It has no original jurisdiction over suits brought by any other political division than a State of the Union (Texas v. White, 7 Wall. 700); nor has it jurisdiction over questions of a political character. (State v. Stanton, 6 Wall. 50; Cherokee Nation v. State, 5 Peters, 1.) So, an Indian tribe is not a foreign state, and cannot institute a suit in the supreme court. (Cherokee Nation v. State, 5 Peters, 1.) The supreme court is the arbiter of controversies between States (Chancely v. Bailey, 37 Ga. 532); as in questions of boundaries (Florida v. Georgia, 17 How. 478; Missouri v. Iowa, 7 How. 660; Alabama v. Georgia, 23 How. 505; Virginia v. West Virginia, 11 Wall. 39; Rhode Island v. Massachusetts, 12 Peters, 657; 15 Peters, 233; State of Virginia v. State of Tennessee, 148 U. S. 503; United States v. State of Texas, 143 U. S. 621), and the rules of practice and proceedings in such cases will be molded to bring it to final hearing on its real merits. (Rhode Island v. Massachusetts, 14 Peters, 210.) A private person cannot commence a suit against a State to recover the proceeds of property in its possession (Ex parte Madrazzo, 7 Peters, 627); and the fact that land has been granted by and is claimed under a State does not make the State a party to the controversy between private persons concerning the land. (Fowler v. Lindsey, 3 Dall. 411.) The supreme court cannot take jurisdiction of a suit between a State and citizens of another State and its own citizens (State of California v. Southern Pac. Co., 157 U. S. 229); nor can a State prosecute a suit in the supreme court on the ground of any remote or contingent interest in itself (State v. Wheeler Bridge Co., 13 How. 518); nor file a bill

to enjoin the President in the performance of his official duties. (State v. Johnson, 4 Wall. 475.) Where a State brings a suit, the bill is filed by the governor on behalf of the State. (Georgia v. Brailsford, 2 Dall. 402; Com. v. Dennison, 24 How. 66.) It may file a bill on a bond on which the obligee has obtained judgment in the circuit court. (Georgia v. Brailsford, 2 Dall. 402.) When a State is defendant, summons served on the governor and attorney-general is sufficient (Chisholm v. Georgia, 2 Dall. 419; Grayson v. Virginia, 3 Dall. 320); and it is entitled to a longer time to answer than an individual. (Rhode Island v. Massachusetts, 13 Peters, 23.) If it fails to appear on the return day, the adverse party may proceed (Ex parte Huger v. South Carolina, 3 Dall. 339; New Jersey v. New York, 5 Peters, 284); and so if it withdraws its appearance. (Rhode Island v. Massachusetts, 15 Peters, 233; S. C., 12 Peters, 657). Where there are indispensable parties that are not made parties to a suit in equity in the supreme court, and the making them parties would oust its jurisdiction, the suit will be dismissed (State of California v. Southern Pac. Ry. Co., 157 U. S. 229).

§ 203. Writs of prohibition and mandamus.—The supreme court shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State or an embassador, or other public minister, or a consul or vice-consul, is a party. (Rev. Stats. sec. 688.)

Prohibition.—A writ of prohibition will be issued only in case of a want of jurisdiction either of the

parties or of the subject matter of the proceeding (Morrison v. District Court, 147 U. S. 14; re Elizabeth Engles, 146 U. S. 357). The writ of prohibition provided for in the above section is the common-law writ; its office is to prevent an unlawful assumption of jurisdiction, and not to correct mere errors and irregularities (Ex parte Cooper, 143 U. S. 472). Before judgment the court above can examine on prohibition not simply the process and pleadings in the record, but the facts in evidence; but after judgment the record proper only should be looked into, and not the evidence, except in extraordinary cases (Ex parte Cooper, 143 U. S. 472). When a writ of prohibition is applied for, the question presented is not whether libelant can recover on the suit he has begun, but whether he can go into a court of admiralty to have his rights determined. (Ex parte Gordon, 3 Morr. Trans. 433.) Where the question of jurisdiction was one proper to be decided by the admiralty court subject to the remedy by appeal, the writ will be denied (Ex parte Gordon, 3 Morr. Trans. 433); as in the case of a suit for pilotage claimed to be due under a statutory regulation (Ex parte Hager, 3 Morr. Trans. 438); or a suit for damages for death in a collision. (Ex parte Gordon, 3 Morr. Trans. 433. See ex parte Gordon, 1 Black, 503.) A writ of prohibition will not be issued after the libel has been dismissed. (U. S. v. Hoffman, 4 Wall. 158.) If the district court entertains a libel in personam to recover damages for a seizure as prize when the prize has been taken into a foreign port, the writ will issue. (U. S. v. Peters, 3 Dall. 121.) Whether the district court has transcended its jurisdiction depends on the facts stated in the record. (Ex parte Easton, 95 U. S. 68.) It cannot be issued to regulate proceedings of the district court as a court of bankruptcy. (In re Christy, 3 How. 292.) It can issue the writ only under special authority of

law. (Ex parte Gordon, 1 Black, 503; In re Christy, 3 How. 292.) It cannot be issued to restrain a proceeding on bill of review, as on condemnation of land under confiscation laws (Ex parte Graham, 10 Wall. 541); nor can the writ issue to restrain the execution of a sentence for crime of one convicted in the circuit court (Ex parte Gordon, 1 Black, 503); nor restrain a proceeding by bill in equity to determine the right to an elective office. (Ex parte Warmouth, 17 Wall. 64.) This court may proceed by way of prohibition in respect to the district court for the district of Alaska. (Re Cooper, 138 U. S. 404. See Farnsworth v. Montana, 129 U. S. 104.) The writ may be issued to the district court in a case in admiralty and maritime cognizance, in which it has no jurisdiction. Ex parte Easton, 95 U. S. 68; United States v. Peters, 3 Dall. 121.) Where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings, the granting of the writ is not obligatory upon the court, and the party applying may be precluded by acquiescence from obtaining it (Ex parte Cooper, 143 U. S. 472). Issues of fact on which the question of jurisdiction depends, raised by a petition of intervention and an answer thereto, are not sufficient grounds for a writ of prohibition against enforcing or proceeding further in orders or decrees previously made in the suit. (Re Gustave Alix, 166 U. S. 136.)

Mandamus, office of writ.—The office of a writ of mandamus is to compel the performance of a plain and positive duty (Ex parte Cutting, 94 U. S. 14), and is the only adequate mode of relief where an inferior court refuses to act (Life & F. Ins. Co. v. Wilson, 8 Peters, 291), or where the exercise of the discretion of the court is irregular, against law, of flagrant injustice, or without jurisdiction. (Ex parte Bradley, 7 Wall. 364.) The writ may be issued to supervise

proceeding in inferior tribunals where there is a legal right without an existing remedy (Ex parte Bradley, 7 Wall. 376); but it is never granted in anticipation of an omission of duty, but only after actual default. (Ex parte Cutting, 94 U. S. 14.) It may issue to compel a court to proceed with the case (Insurance Co. v. Comstock, 16 Wall. 258; Railroad Co. v. Wiswall, 23 Wall. 507); or to take jurisdiction of a case dismissed for want of jurisdiction (Re Hohorst, 150 U. S. 653); or to remand a case (Ex parte Virginia, 100 U. S. 339); or to reinstate a case (Ex parte Bradstreet, 7 Peters, 634); or to entertain a motion in a case (Ex parte Russell, 13 Wall. 664); or to proceed to judgment; but a plain case must be made out. (Life & F. Ins. Co. v. Adams, 9 Peters, 571.) If the circuit court possess an order staying a suit, mandamus is the remedy. (Livingston v. Dorgenois, 7 Cranch, 577.) A writ of mandamus may be issued to compel an inferior tribunal to decide a case, but it cannot direct the manner in which to decide or indicate the character of the judgment. (Life & F. Ins. Co. v. Adams, 9 Peters, 571; United States v. Addison, 22 How. 174; see Ex parte Burtis, 103 U. S. 238; Re Parsons, 150 U. S. 150; Morrison v. District Court, 147 U. S. 14.) The court will not, by mandamus, compel an inferior court to reverse a decision. (Ex parte Perry, 102 U. S. 183.) If a court renders a judgment of dismissal for want of jurisdiction, but refuses to enter it, mandamus lies to compel the entry (Ex parte Bradstreet, 6 Peters, 774); and if the judge dies before signing the judgment, his successor may be compelled by mandamus to do so. (Life & F. Ins. Co. v. Wilson, 8 Peters, 291; Life & F. Ins. Co. v. Adams, 9 Peters, 571.) It may be issued to compel a judge to sign a bill of exceptions (Ex parte Crane, 5 Peters, 190), but not if he says it is incorrect (Ex parte Bradstreet, 4 Peters, 102); nor if it has not been properly prepared; nor will it issue to compel a judge to re-

settle a bill of exceptions on affidavits that as settled it is incorrect (Re Louis F. Streep, 156 U. S. 207). It may be issued to compel a judge to carry the judgment into effect. (Stafford v. Union Bank, 16 How. 135; Stafford v. New Orleans C. & B. Co., 17 How. 283.) If an inferior court disobeys or mistakes the mandate of the supreme court, the errors or omissions may be brought up by motion for a mandamus. (U. S. v. Fossatt, 21 How. 445; White v. U. S., 1 Black, 501; Ex parte Dubuque & Pac. R. R. Co., 1 Wall. 69; Chicago B. & Q. R. Co. v. City of Chicago, 166 U. S. 258; Gaines v. Rugg, 148 U. S. 228; Re City National Bank of Fort Worth, 153 U. S. 246; City National Bank v. Hunter, 152 U. S. 512; but see Re Postal Telegraph Cable Co., 53 U. S. App. 635; 85 Fed. Rep. 853.) The judgment in a mandamus proceeding is subject to review. (Hartman v. Greenhow, 102 U. S. 672.) The supreme court may issue a mandamus to the court of claims. (Ex parte Roberts, 15 Wall. 384; Ex parte United States, 16 Wall. 699.) A writ of mandamus may properly be issued by the supreme court of the United States to compel the judge of an inferior court to settle and sign a bill of exceptions. (Re Chateaugay Ore & Iron Co.'s Petition, 128 U. S. 544.) The Supreme Court of the United States will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law. (United States v. Black, 128 U. S., 40. See Ex parte Penn. Co., 137 U. S. 451.)

Mandamus, when will not issue.—The writ of mandamus will not issue when there is any other appropriate remedy (United States v. Addison, 22 How. 174; Ex parte Newman, 14 Wall. 152; Morrison v. District Court, 147 U. S. 14); so it will not issue to revise a decree or judgment, the remedy being by error or appeal (Ex parte Newman, 14 Wall. 152; Ex

parte Flippin, 94 U. S. 348; Ex parte Loring, 94 U. S. 418; Ex parte Schwab, 98 U. S. 240); so it cannot be issued to reverse a judgment and direct the court to issue a mandamus on its part (Ex parte De Groot, 6 Wall. 497); but if the circuit court refuses to allow an appeal, mandamus lies to compel it to do so (Ex parte Jordan, 94 U. S. 248; Ex parte Railroad Co., 95 U. S. 221); but petitioner must show a clear right to the appeal (Ex parte Cutting, 94 U. S. 14); and if the judge is ready to allow the appeal, but the application therefor was irregular, mandamus will not be awarded. (Mussina v. Cavazos, 20 How. 280.) Mandamus will not lie to compel the circuit court to dismiss a suit for want of jurisdiction (Re Atlantic City Ry. Co., 164 U. S. 633). A mandamus will not be issued to compel the court to withdraw a plea and direct a different issue, for error in the proceedings can only be corrected by writ of error (Bank v. Sweeny, 1 Peters, 567); nor to compel a judge to vacate an order, for it is not the proper process to correct an erroneous judgment. (Ex parte Hoyt, 13 Peters, 279. See Re Burdett, 127 U. S. 771.) Mandamus will not lie to compel a lower court to decide a case in a particular way (Re Parsons, 150 U. S. 150; Morrison v. District Court, 447 U. S. 14). It will not lie to compel a judge to resettle a bill of exceptions alleged to be incorrect as settled (Re Louis F. Streep, 156 U. S. 207). This court cannot, by mandamus, correct the judicial errors committed by an inferior court in the progress of a cause; that is the office of a writ of error or an appeal. (Ex parte Perry, 102 U. S. 183; Ex parte Whitney, 13 Peters, 404; Ex parte Newman, 14 Wall. 152; Ex parte Loring, 94 U. S. 418; Ex parte Schwab, 98 U. S. 240; Ex parte Burtis, 103 U. S. 238; Ex parte Des Moines etc. R. Co., 103 U. S. 794; Ex parte Connecticut Mut. Ins. Co.; Ex parte Hoard, 105 U. S. 578; Ex parte

Baltimore & O. R. Co., 108 U. S. 566; Ex parte De Groot, 6 Wall. 497; Re Parsons, 150 U. S. 150; Re Milton Humes, 149 U. S. 192; American Const. Co. v. Jacksonville, Tampa & Key West Ry. Co., 148 U. S. 372; Morrison v. District Court, 147 U. S. 14.)

(1) **To control political department.**—While the political department of the government has not parted with its power over a matter, the intervention of the judicial department cannot be invoked to compel action. (United States, Boynton v. Blaine, 139 U. S. 306; City of New Orleans v. Paine, 147 U. S. 261.) Mandamus will not issue to compel the secretary of state to pay money in his hands to one party which is claimed by another party, and the right to which is in litigation between them. (Bayard v. United States, White, 127 U. S. 246.) The courts will not interfere with the executive officers of the government in the exercise of their ordinary official duties. (United States, Miller v. Raum, 135 U. S. 200.) Mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. (United States, Boynton v. Blaine, 139 U. S. 306.) When executive officers refuse to act at all, where the law requires them to act, or when they refuse to perform a mere ministerial duty, a mandamus lies to compel them to act or to perform such ministerial duty. (United States, Miller v. Raum, 135 U. S. 200. See United States v. Brown, 41 Fed. Rep. 481.) Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party coerced must have the power to perform the act (State of Missouri v. Murphy, 170 U. S. 78.)

(2) **Cannot control discretion.**—A writ of mandamus will not be issued to control a judge in the ex-

ercise of his discretion (Ex parte Milwaukee R. Co., 5 Wall. 188); as in approving or rejecting a bond. (Ex parte Milwaukee R. Co., 5 Wall. 188); or in refusing a supersedeas (re Haberman Mfg. Co., 147 U. S. 525). If an inferior tribunal has exercised its judgment in a matter wherein authorized by law, mandamus will not issue to reverse its judgment (Ex parte Taylor, 14 How. 3; Ex parte Many, 14 How. 24); so of orders in exercise of his authority (Ex parte Whitney, 13 Peters, 404); nor can it be compelled to vacate an order (Ex parte Loring, 94 U. S. 418); or to set aside a default and inquest thereon (Ex parte Roberts, 6 Peters, 216; nor to vacate an injunction issued in the case. (Ex parte Schwab, 98 U. S. 240.) If a mandate leaves the circuit judge to determine according to right and equity, mandamus will not issue to control his decision. (Ex parte Railway Co., 101 U. S. 711.) A mandamus will not be issued to control the conduct of a judge in proceedings which take place before the trial (Ex parte Bradstreet, 8 Peters, 588); as the allowance or refusal of amendments (Ex parte Bradstreet, 6 Peters, 774; S. C., 7 Peters, 634); or amendments to the record (Ex parte Many, 14 How. 24); or where he refuses to allow double pleas (Ex parte Davenport, 6 Peters, 661); or where he refuses to quash a writ of execution (Ex parte Flippin, 94 U. S. 348); or if he refuses to discharge defendant from arrest on bail for a different amount (Ex parte Taylor, 14 How. 3); or to compel a judge to proceed according to the rules of chancery practice (Ex parte Whitney, 13 Peters, 404); or to compel him to issue execution, although he refuses to do so (Ransom v. New York, 20 How. 581); or to control his discretion in granting or refusing a new trial (Life & F. Ins. Co. v. Wilson, 8 Peters, 291; Ex parte Bradstreet, 8 Peters, 588); or if he refuses to issue a warrant for a deserter because he

does not think the evidence sufficient. (U. S. v. Lawrence, 3 Dall. 45.) The judgment of the circuit court upon a plea to the jurisdiction will not be reviewed on a petition for mandamus. (Ex part Railway Co., 103 U. S. 794.) This court cannot by mandamus compel an inferior court to reverse its decision. (Ex parte Burtis, 103 U. S. 238.) That mandamus will not issue to control judicial discretion. (Ex parte Milwaukee etc. R. Co., 5 Wall. 188; Ex parte Hoard, 105 U. S. 578; Ex parte Virginia ("Virginia v. Rives"), 100 U. S. 313; Ex parte Sawyer, 21 Wall. 235; Ex parte Denver etc. R. Co., 101 U. S. 711.) The duty must not only be not discretionary, but it must exist at the time when the application is made. The obligation must be both peremptory and plainly defined; the law must not only authorize the act, but it must require the act to be done (United States v. Lamont, 155 U. S. 303.)

§ 204. **Issues of fact.**—The trial of issues of fact in the supreme court in all actions at law against citizens of the United States shall be by jury. (Rev. Stats. sec. 689.)

§ 205. **Appellate jurisdiction.**—The supreme court shall have appellate jurisdiction in the cases hereinafter specially provided for. (Rev. Stats. sec. 690.)

Jurisdiction—How conferred.—See U. S. Const., art. III, sec. 2, cl. 2; Wales v. Whitney, 114 U. S. 564. The appellate powers of the supreme court are given by the Constitution, but they are limited and regulated by statute. (Durousseau v. U. S., 6 Cranch, 307; National Exch. Bank v. Peters, 144 U. S. 570.) Congress has described the jurisdiction, and this description implies a negative to the exercise of such appellate power if not comprehended within it. (Du-

rousseau v. U. S., 6 Cranch, 314; U. S. v. Young, 94 U. S. 259; Ex parte Vallandigham, 1 Wall. 251; Railroad Co. v. Grant, 98 U. S. 401.) Appellate jurisdiction in criminal cases should be conferred in clear and explicit language (Cross v. United States, 145 U. S. 571).

Appellate jurisdiction.—In every case to which the judicial power extends, and in which original jurisdiction is not given, the supreme court may exercise its appellate jurisdiction. (Cohens v. Virginia, 6 Wheat. 264; Marbury v. Madison, 1 Cranch, 137; Ex parte Vallandigham, 1 Wall. 252; Ex parte Yerger, 8 Wall. 98; Martin v. Hunter, 1 Wheat. 304; United States v. Coe, 155 U. S. 76.) Where original jurisdiction is founded on the character of the parties, the judicial power cannot be exercised in its appellate form (Osborn v. Bank of United States, 9 Wheat. 738); but where it is founded on the nature of the controversy the appellate jurisdiction attaches. (Martin v. Hunter, 1 Wheat. 304; Cohen v. Virginia, 6 Wheat. 264.) The essential criterion of appellate jurisdiction is, that it raises and corrects proceedings in a cause already instituted. (Marbury v. Madison, 1 Cranch, 137.) In prize cases the supreme court can exercise appellate jurisdiction only. (The Alicia, 7 Wall. 571.) The appellate power is not limited to any particular courts. (Martin v. Hunter, 1 Wheat. 304; Cohens v. Virginia, 6 Wheat. 264; Dodge v. Woolsey, 18 How. 331; Ableman v. Booth, 21 How. 506; 3 Wis. 1; Ferris v. Coover, 11 Cal. 176; Piqua Bank v. Knoup, 6 Ohio St. 342; 16 How. 369.) It may be exercised over territorial courts (Benner v. Porter, 9 How. 244; Hunt v. Palao, 4 How. 589; Freeborn v. Smith, 2 Wall. 173), but not without legislation by Congress (McNulty v. Batty, 10 How. 79), or over State courts on questions involving the constitutionality of legal enactments. (Bridge Prop. v. Hoboken Co., 1 Wall.

116; Furman v. Nichol, 8 Wall. 57; Delmas v. Ins. Co., 14 Wall. 667; Home Ins. Co. v. Augusta, 93 U. S. 116; Ferris v. Coover, 11 Cal. 176; but see Johnson v. Gordon, 4 Cal. 368.) In actions within the admiralty jurisdiction the appellate jurisdiction of the supreme court over questions national in character cannot be limited by the fact that plaintiff has elected to pursue his common-law remedy in a State court (Belden v. Chase, 150 U. S. 674). But it cannot exercise appellate jurisdiction over the court of claims (Gordon v. U. S., 2 Wall. 561), nor can Congress confer appellate jurisdiction on the inferior courts from the decisions of the State courts. (Patrie v. Murray, 43 Barb. 323; Wetherbee v. Johnson, 14 Mass. 412). Congress has power to confer upon the supreme court jurisdiction to review the decree of the court of private land claims (United States v. Coe, 155 U. S. 76). The principle on which appellate jurisdiction from State courts is allowed is to grant efficient and just means of self protection. (Scott v. Jones, 5 How. 343.) The supreme court's jurisdiction over inferior courts is strictly appellate. (Gaines v. Relf, 15 Peters, 17). The jurisdiction on appeal must be conferred by Congress (Barry v. Mercein, 5 How. 119; Ex parte McCardle, 7 Wall. 506; U. S. v. New Bedford Br., 1 Wood. & M. 401, Fed. Cas. No. 15867; Livingston v. Van Ingen, 9 Johns. 507; Marbury v. Madison, 1 Cranch, 137; Ex parte Bollman, 4 Cranch, 75; U. S. v. Hamilton, 3 Dall. 17; Ex parte Kearney, 7 Wheat. 38; Weston v. Charleston, 2 Peters, 449; Ex parte Cranch, 5 Peters, 190; American Const. Co. v. Jacksonville T. & K. Ry. Co., 148 U. S. 372), with such exceptions and under such regulations as Congress may make (Scott v. Jones, 5 How. 374; Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Wall. 98; Durousseau v. U. S., 6 Cranch, 313; Ex parte Vallandigham, 1 Wall. 252; U. S. v. More, 3 Cranch, 159;

Murdock v. Memphis, 20 Wall. 590; Martin v. Hunter, 1 Wheat. 304), and the action of Congress excludes State legislation. (Houston v. Moore, 5 Wheat. 1; Prigg v. Commonwealth, 16 Peters, 539.) When appellate jurisdiction is intended to be conferred on the supreme court in criminal cases, it should be done in clear and explicit language (Cross v. United States, 145. U. S. 571). All appellate jurisdiction must be exercised in pursuance of positive statutes fully within constitutional grants. (Wiscart v. Dauchy, 3 Dall. 321; Clarke v. Bazadone, 1 Cranch, 212; U. S. v. Moore, 3 Cranch. 159; Durousseau v. U. S., 6 Cranch, 307; Ex parte Kearney, 7 Wheat. 38; Ex parte Watkins, 3 Peters, 193.) The power of the supreme court to issue a mandamus is in the exercise of an appellate jurisdiction only. (Marbury v. Madison, 1 Cranch, 137; Ex parte Yerger, 8 Wall. 97.) So as to the writ of habeas corpus. (Ex parte Bollman, 4 Cranch, 75.) The power to award this writ by any court of the United States must be given by law. (Ex parte Bollman, 4 Cranch, 75.) It exists in all cases of commitment by the judicial authority of the United States not expressly excepted by Congress. (Kaine's Case, 14 How. 103; Ex parte Yerger, 8 Wall. 99.) It is only when the proceedings below are entirely void that relief may be given on review by habeas corpus. (Ex parte Parks, 93 U. S. 18.) The repeal of an act authorizing appeal in cases of habeas corpus does not affect the jurisdiction antecedently exercised. (Ex parte McCardle, 7 Wall. 506.) An enactment of the Confederate States enforced as a law of one of the States composing the confederacy is a statute of such State, as to the jurisdiction of the supreme court over judgments and decrees in State courts. (Ford v. Surget, 97 U. S. 594; Williams v. Bruffy, 96 U. S. 176.) The supreme court on writ of error is confined to the exceptions and cannot de-

termine questions of fact, or the weight of evidence (New York L. E. & W. R. Co. v. Winter, 143 U. S. 60; Benson M. & S. Co. v. Alta Min. & S. Co., 145 U. S. 428; but see Wetmore v. Rymer, 169 U. S. 115). The supreme court will not determine a controversy in which the plaintiff in error has become the dominis litis on both sides (South Spring Hill G. M. Co. v. Amador Medean G. M. Co., 145 U. S. 300). Except in cases of gross abuse of discretion the supreme court on writ of error will not review discretionary rulings (Mexican Cent. Ry. Co. v. Pinkney, 149 U. S. 194). The question of the jurisdiction of the supreme court, and the court from which the record comes will be determined by the supreme court of its own motion (Connell v. Smiley, 156 U. S. 335; Campbell v. Porter, 162 U. S. 478; Mattingly v. Northwestern Virginia R. Co., 158 U. S. 53; Koenigsberger v. Richmond Silver M. Co., 158 U. S. 41). The jurisdiction must affirmatively appear upon the record or the supreme court will deny the jurisdiction (Colorado Cent. M. Co. v. Turck, 150 U. S. 138).

§ 206. **Appeals from district and circuit courts.**—Hereafter, all appeals by writ of error or otherwise from said district courts shall only be subject to review in the supreme court of the United States, or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States, or in the circuit court of appeals hereby established according to the provisions of this act regulating the same. (26 U. S. Stats. sec. 2734.)

Note.—The supreme court has no jurisdiction of an appeal from a decree of the circuit court rendered

Oct. 1, 1891, in a case pending March 3, 1891, under the joint resolution of that date preserving jurisdiction in pending cases (Little Rock & M. R. Co. v. East Tennessee, Va., Ga. R. Co., 159 U. S. 698). By the act of March 3, 1891, the jurisdiction of the supreme court in cases dependent upon diverse citizenship was taken away (Cincinnati S. & L. Co. v. Grand Rapids S. D. Co., 146 U. S. 54).

§ 207. **Appeals direct to supreme court from district and circuit courts.**—Appeals or writs of error may be taken from the district courts, or from the existing circuit courts direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. From the final sentences and decrees in prize causes. In cases of conviction of a capital crime. In any case that involves the construction or application of the Constitution of the United States. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Nothing in this act shall affect the jurisdiction of the supreme court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases. (Act of March 3, 1891; 26 U. S. Stats. 827, sec. 5; as amended 29 U. S. Stats. 492.).

Appeals directly to supreme court.—In the cases enumerated in the statute, appeals may be taken directly to the supreme court from the circuit or district court, but cannot be taken in other cases except such as were mentioned in the joint resolution of March 3, 1891 (Mason v. Pewabic Min. Co., 153 U. S. 361; Ogden v. United States, 148 U. S. 390). The right of appeal directly to the supreme court is an absolute right and the circuit courts have no authority to allow or disallow such an appeal (Pullman's Palace Car. Co. v. Cent. Transp. Co., 71 Fed. Rep. 809). A writ of error from the supreme court to the circuit court does not reach the proceedings in the circuit court of appeals, refusing to allow the cause to be docketed and the record to be filed therein, on the ground that the cause should be taken directly to the supreme court (Lutcher v. United States, 157 U. S. 427). The circuit court has no authority to grant an appeal to the supreme court of the United States without requiring bond for costs (In re Newman, 79 Fed. Rep. 615). Where the supreme court decides that the circuit court has jurisdiction of a cause and remands the same for the taking of an account the circuit court of appeals cannot on a subsequent appeal reopen the question of jurisdiction (Nashua & L. R. Corp. v. Boston & L. R. Corp., 5 U. S. App. 97; 51 Fed. Rep. 929).

(1) **When the jurisdiction of court is in issue.**—The jurisdiction of court is not drawn in question by the denial of the right of plaintiff to the judgment entered in its favor, nor in the authority of the court to enter the judgment in question, and therefore an appeal cannot be taken from the circuit court to the supreme court (Woodbridge & Turner Eng. Co. v. Ritter, 70 Fed. Rep. 679). When a final judgment or decision has been rendered in a district or circuit court involving both questions of

jurisdiction and other questions, the party against whom it is rendered may elect to take his writ of error to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals on the whole case. When he chooses the latter, the circuit court of appeals has jurisdiction to determine the question of the jurisdiction of the court below, as well as all other questions in the case (Rust v. United Waterworks Co., 36 U. S. App. 167; 70 Fed. Rep. 129; Baltimore & Ohio Ry. Co. v. Meyers, 18 U. S. App. 569; 62 Fed. Rep. 367; American Sugar Ref. Co. v. Johnson, 13 U. S. App. 681; 60 Fed. Rep. 503; Texas & P. R. Co. v. Bloom, 23 U. S. App. 143; 60 Fed. Rep. 979; King v. McLean Asylum, 21 U. S. App. 407; 64 Fed. Rep. 325; United States v. Jahn, 155 U. S. 109; Robinson v. Caldwell, 165 U. S. 359). And if an appeal is taken to the circuit court of appeals and the whole case has been determined on its merits, and appeal cannot then be taken to the supreme court direct from the circuit court on the question of jurisdiction, such case can be taken to the supreme court only upon certiorari after final decree upon the merits in the circuit court of appeals (Robinson v. Caldwell, 165 U. S. 359). The supreme court alone has power to review cases in which the only question on appeal is the jurisdiction of the court below (United States v. Severens, 37 U. S. App. 622; 71 Fed. Rep. 768; Cabot v. McMaster, 24 U. S. App. 571; 65 Fed. Rep. 533; United States v. Jahn, 155 U. S. 109). The determination of the question of jurisdiction by the supreme court cannot be had until after final decree in the circuit court (Gates v. Bucki, 12 U. S. App. 69; 53 Fed. Rep. 961). A question whether jurisdiction has been acquired by proper service of process is sufficient to carry the appeal to the supreme court (Shepard v. Adams, 168 U. S. 618). The question of jurisdiction is not suffi-

ciently specific to be certified where it was not raised in the circuit court, and no hint is given as to what objection exists (McIlenry v. Alford, 168 U. S. 651). An assignment of errors in the U. S. district court after the term at which the decree was entered, directed by that court to be filed nunc pro tunc, and filed as of that term, is not a sufficient certificate to the supreme court of the question of the jurisdiction of that court (The Bayonne, 159 U. S. 87). The allowance of an appeal cannot be treated as a certificate, although want of jurisdiction was the ground of appeal, where the prayer for appeal specifies no ground of jurisdiction, but asks that the whole record be sent up (The Bayonne, 159 U. S. 687). When the jurisdiction of the circuit court was in issue, a certificate of such question of jurisdiction to the supreme court for decision is necessary or the case is not properly in the court (Ansbro v. United States, 159 U. S. 695; Davis & Rankin Bldg. & Mfg. Co. v. Barber, 157 U. S. 673; Colvin v. Jacksonville, 157 U. S. 368; Moran v. Hagerman, 151 U. S. 329; Maynard v. Hecht, 151 U. S. 324; Van Wagenan v. Sewall, 160 U. S. 369; Chappell v. United States, 160 U. S. 499). The absence of such certificate cannot be helped out by resort to the petition for writ of error, nor to the assignment of error. (Maynard v. Hecht, 151 U. S. 324.) The question of jurisdiction is sufficiently certified where the judgment and bill of exceptions recite that the cause was dismissed for want of jurisdiction; and the district judge in the order allowing the writ of error certified in effect that it was allowed upon the question of jurisdiction (Re Lehigh Min. & Mfg. Co., 156 U. S. 322). A plea which was not a plea to the jurisdiction, but a plea in bar, which did not seek to oust the jurisdiction of that court, does not present a question for jurisdiction which the supreme court can review (Texas & Pac. Ry. Co.

v. Saunders (151 U. S. 105.) The question of jurisdiction must have been in issue in the circuit court and decided against the party seeking to bring it before the supreme court for determination (Maynard v. Hecht, 151 U. S. 324). It is a sufficient certification to the supreme court of the question of jurisdiction of the circuit court that the petition of appeal is upon that sole ground, and that that court in allowing the appeal states that the appeal is granted "solely upon the question of jurisdiction," and directs the portions of the record to be certified to the supreme court to present that question (Shields v. Coleman, 157 U. S. 168; Smith v. McKay, 161 U. S. 355). Where the record shows that the only matter tried and decided was a demurrer to the plea to the jurisdiction, and the petition on which the writ of error was allowed asks for a review of the judgment that the circuit court had no jurisdiction, the question is sufficiently certified (Interior Construction & Impr. Co. v. Gibney, 160 U. S. 217). In the absence of any certificate of the question of the jurisdiction of the circuit court, its order entered Nov. 28, 1891, dismissing a case for lack of jurisdiction, is not subject to review on writ of error from the supreme court (Davis v. Geissler, 162 U. S. 290). Where the jurisdiction of the lower court is in issue and the case is certified for decision the certificate must be granted during the term at which the judgment or decree is rendered (Colvin v. Jacksonville, 158 U. S. 456). A party whose suit has been dismissed by the U. S. circuit court for want of jurisdiction has the right to have such judgment reviewed by the supreme court (Wetmore v. Rymer, 169 U. S. 115). Where the question is as to the jurisdiction of the court in equity based on the alleged existence of a complete remedy at law, the question cannot be certified to the supreme court, for the question in such case is not to the want of power, but to the want of equity

(Smith v. McKay, 161 U. S. 355). The statute does not authorize a direct appeal to the supreme court on a question involving the jurisdiction of the circuit court over another suit previously determined in the same court (Carey v. Houston & T. C. R. Co., 150 U. S. 170; Ex parte Lennon, 150 U. S. 393). The only question that can be considered in the supreme court when the question of the jurisdiction of the trial court is certified is that of its jurisdiction. (Schunk v. Moline M. & S. Co., 147 U. S. 500; Re Lehigh M. & M. Co., 156 U. S. 322; Greeley v. Lowe, 155 U. S. 58; Maynard v. Hecht, 151 U. S. 324; Mexican Cent. Ry. Co. v. Pinkney, 149 U. S. 194.)

(2) **In case of conviction of capital crime.**—In the original act creating the circuit court of appeals (26 U. S. Stats. 827) the supreme court had jurisdiction of cases brought directly from the circuit and district courts where the cases involved a conviction of a capital or other infamous crime. This provision was subsequently amended so as to withdraw from the supreme court jurisdiction over infamous crimes not capital, and to confer it upon the circuit courts of appeals (29 U. S. Stats. 492). At present, therefore, appeals may be taken directly to the supreme court only in such criminal cases as are capital. (Id.) Appeals from habeas corpus proceedings can no longer be taken directly to the supreme court in criminal cases, except in the cases mentioned in the section 5 of the act of 1891 (Cross v. Burke, 146 U. S. 82; re James Lennon, 150 U. S. 393). The final judgment of a court in case of conviction of capital or otherwise infamous crime is reviewable only upon writ of error and not by appeal (Bucklin v. United States, 159 U. S. 680).

(3) **When Federal question is involved.**—When an appeal is taken to the supreme court direct on

the ground that a Federal question is involved, and an appeal is also taken to the circuit court of appeals, the latter court will stay its hand until the appeal in the supreme court is disposed of (Pullman's Palace Car Co. v. Central Trans. Co., 83 Fed. Rep. 1). A party in the circuit court may resort to the supreme court for a determination of a constitutional question, and while such appeal is pending may appeal to the circuit court of appeals upon the other questions involved. (Pullman's Palace Car Co. v. Central Transp. Co., 39 U. S. App. 307; 76 Fed. Rep. 401.) An appeal from a decision of a circuit court involving a question of the United States constitutionality of a State statute is within the jurisdiction of the supreme court (Hastings v. Ames, 32 U. S. App. 485; 68 Fed. Rep. 726.) Where the only question arising in the circuit court under a treaty was as to whether the petitioner was seeking an asylum in the United States, and no question as to the construction or validity of the treaty was involved, an appeal directly to the supreme court was not permissible (In re Newman, 79 Fed. Rep. 615). When no construction or application of the constitution was either expressed or asked in the circuit court, a case cannot be carried directly to the supreme court of the United States from the circuit court (Cornell v. Green, 163 U. S. 75). In a case before the supreme court on the ground that a constitutional question is involved, it has jurisdiction of the entire case and of all questions involved in it (Scott v. Donald, 165 U. S. 58; Chappell v. United States, 159 U. S. 698; Horner v. United States, 143 U. S. 570; Holder v. Aultman, Miller & Co., 169 U. S. 81). The supreme court does not gain jurisdiction because the circuit court directed the jury to find for defendant, and because it is claimed plaintiff is thereby deprived of the right of trial by jury. (The Treat Mfg. Co. v. Stand-

ard Steel & Iron Co., 157 U. S. 674). An appeal lies directly to the Supreme Court from the final decision of a circuit court upon habeas corpus in case of any person alleged to be restrained of his liberty in violation of the Constitution of the United States (McKane v. Durston, 153 U. S. 684). Where the construction of a treaty between the United States and Mexico is drawn in question in a final order of the district court discharging persons from custody in extradition proceedings, an appeal may be taken directly to the supreme court. (Ornelas v. Ruiz, 161 U. S. 502.) Where a case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of the supreme court. (Horner v. United States, 143 U. S. 570.) The constitutional question need not have been upheld or denied in the lower court in order to give the supreme court jurisdiction. (Holder v. Aultman, Miller & Co., 169 U. S. 81.) The fact that the claim that the State law violates the Constitution of the United States is not well founded does not deprive the supreme court of jurisdiction. (Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685.) The claim that a city ordinance violates the Constitution is as good for jurisdiction purposes as the claim that a State statute so violates it. (Penn Mutual Life Ins. Co. v. City of Austin. (168 U. S. 685.) The jurisdiction of the court of appeals attaches upon the filing of the writ of error in the office of the clerk of the circuit, and is not defeated by irregularity in the transcript or in its certification. (Burnham v. North Chicago St. Ry. Co., 87 Fed. Rep. 168.) An appeal and supersedeas do not oust the jurisdiction of the lower court or preclude collateral or independent proceedings. (Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 54 Fed. Rep. 26.) The circuit court of appeals has no jurisdiction to review a judgment rendered before the act creating that court was passed,

where the amount claimed was too small to give jurisdiction to the supreme court. (United States v. National Exch. Bank, 9 U. S. 145; 53 Fed. Rep. 9.) In an admiralty case the decree of a circuit court on appeal was renewable in the circuit courts of appeals, where the appeal to the circuit court was taken prior to July 1, 1891. (The Mattano, 8 U. S. App. 111; 52 Fed. Rep. 876.)

§ 207a. **Review by supreme court of decisions of circuit court of appeals.**—The circuit courts of appeals established by this act shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decisions in the district court, and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require

that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the supreme court to require, by certiorari or otherwise, any such case to be certified to the supreme court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court. In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ or error or review of the case by the supreme court of the United States, where the matter in controversy shall exceed one thousand dollars, besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed. (26 U. S. Stats. 828, sec. 6.)

Judgments final in circuit court of appeals.—Where a decree of the circuit court of appeals is final in the main suit, decrees in accessory and subordinate proceedings are also final. (Gregory v. Van Ee, 160 U. S. 643; Rouse v. Letcher, 156 U. S. 47.) Where one judge of the circuit court of appeals is disqualified and the other two are divided in opinion, and the judgment of the circuit court of appeals is not "final" it is not necessary for that court to order a reargument before a full bench nor proper to certify questions to the supreme court for instructions. (Texas & Pac. R. Co. v. Gentry, 13 U. S. App.

531; 57 Fed. Rep. 422.) In cases in which the jurisdiction of the circuit court of appeals is not made final there is a right of appeal or writ of error by supreme court where the matter in controversy exceeds $1,000, besides costs. (Northern Pac. Ry. Co. v. Amato, 144 U. S. 465.)

(1). **When diverse citizenship is only ground.**—When diverse citizenship is the only ground of jurisdiction the judgment of the circuit court of appeals is final. (Press. Pub. Co. v. Monroe, 164 U. S. 105; American Construction Co. v. Jacksonville T. & K. W. Ry. Co., 148 U. S. 372; Benjamin v. City of New Orleans, 169 U. S. 161; Rouse v. Letcher, 156 U. S. 47; Colorado Cent. Cons. Co. v. Turck, 150 U. S. 138; Roscoe v. Hornsby, 161 U. S. 588.) And this is so even though defendant invokes the Federal Constitution and laws. (Press. Pub. Co. v. Monroe, 164 U. S. 105.) Where a court had jurisdiction of a suit only upon the ground of diverse citizenship, and the court's jurisdiction over an ancillary suit depended only upon its jurisdiction over the original suit, the decree of the circuit court of appeals is final. (Carey v. Houston & Tex. Cent. Ry. Co., 161 U. S. 115; Rouse v. Letcher, 156 U. S. 47.) If the circuit court of appeals had jurisdiction of the cause not alone on the ground of diverse citizenship, but on the further ground that a Federal question was involved, the judgment of the circuit court of appeals was not final. (Northern Pac. Ry. Co. v. Amato, 144 U. S. 465; Union Pac. Ry. Co. v. Harris, 158 U. S. 326.) But if the jurisdiction of the circuit court of appeals was originally invoked upon the sole ground of diverse citizenship, its judgment is final, even if another ground was developed in the course of the proceeding. (Charles F. Jones, 164 U. S. 691; Borgmeyer v. Idler, 159 U. S. 408.)

(2). **Cases arising under revenue laws.**—The judgments of the circuit court of appeals are final in cases arising under the revenue laws. (Hubbard v. Soby, 146 U. S. 56.) A judgment of the circuit court on appeal from a decision of the board of general appraisers is one arising under the revenue laws. (United States v. Hopewell, 5 U. S. App. 137; 51 Fed. Rep. 798.)

(3). **Cases arising under patent laws.**—A suit by the United States to cancel a patent for an invention is not a case arising under the patent laws, and such a suit is not final in the circuit court of appeals. (United States v. American Bell Tel. Co., 159 U. S. 548.)

(4). **Cases arising under criminal laws.**—A writ of scire facias upon a forfeited recognizance to secure the appearance of a person to answer to a charge of embezzlement is a case arising under criminal laws. (Hunt v. United States, 166 U. S. 424.)

Certification of questions to supreme court by circuit court of appeals.—The circuit court of appeals will not certify the questions in a case to the supreme court, except before it decides them and upon its own motion. (Andrews v. National Foundry & P. Co., 46 U. S. App. 619; 77 Fed. Rep. 774; Lornville N. A. & C. Ry. Co. v. Pope, 46 U. S. App. 25; 74 Fed. Rep. 1.) An application to certify certain questions to the supreme court for decision will be denied where the case presents no peculiarities rendering such action appropriate. (The Horace B. Parke, 33 U. S. App. 503; 74 Fed. Rep. 640; Fabre v. Cunard Steamship Co., 11 U. S. App. 616; 59 Fed. Rep. 500.) A circuit court of appeals will not withhold a decision of other questions presented for review in a case because on one out of many it desires the opinion of the supreme

court. (Sigafus v. Porter, 56 U. S. App. 62; 84 Fed. Rep. 430.) Certification cannot be granted where the mixed issues of law and fact could be reviewed satisfactorily only upon examination of the entire record. (Fabre v. Cunard Steamship Co., 11 U. S. App. 616; 59 Fed. Rep. 500; Warner v. City of New Orleans, 167 U. S. 467; Graver v. Faurot, 162 U. S. 435; Cross v. Evans, 167 U. S. 60.) In order to invoke the exercise of the jurisdiction in the supreme court in the instruction of the circuit court of appeals, the questions or propositions of the law the proper decisions of which instruction is asked, must be clearly and distinctly certified, and the certificate must show that instruction is desired. (Columbus Watch Co. v. Robbins, 148 U. S. 266; United States v. Union Pacific Ry. Co., 168 U. S. 505; McHenry v. Alford, 168 U. S. 651; Cross v. Evans, 167 U. S. 60.) The assertion of a difference of decision between two circuit courts of appeals upon the same facts, and of a wish that it might be determined by the supreme court is not equivalent to the expression of a desire for instruction as to the proper decision of a specific question or questions requiring determination in the proper disposition of the case. (Columbus Watch Co. v. Robbins, 148 U. S. 266.) A certificate of propositions of law is irregular where a quorum of the circuit court of appeals which desires instruction does not sit in the case. (Cincinnati, H. & D. R. Co. v. McKeen, 149 U. S. 259.) The certificate should contain a proper statement of the facts on which the questions or propositions of law arise. (Cincinnati, H. & D. R. Co. v. McKeen, 149 U. S. 259.) The whole record should not be transmitted to the Supreme Court. (Cincinnati, H. & D. R. Co. v. McKeen, 149 U. S. 259; Graver v. Faurot, 162 U. S. 435.) Questions certified by the circuit court of appeals will not be considered when other separate and distinct propositions of law not

expressly referred to in the certificate are essential to be passed upon in considering the general questions certified. (Cross v. Evans, 167 U. S. 60; United States v. Union Pac. Ry. Co., 168 U. S. 505.) For a case which was of a nature to be certified, see National Acc. Soc. v. Spiro, 37 U. S. App. 639; 71 Fed. Rep. 897.) Section 6 of the act of Congress of March 3, 1891, establishing the circuit court of appeals, making its decision final in certain cases, but providing that the supreme court may require any such case to be certified to it for instructions, does not require the appellate court to certify any question for review by the supreme court, which identical question had been already decided by the supreme court. (Lau Ow Bew v. United States, 7 U. S. App. 1; 47 Fed. Rep. 641.)

Certiorari to compel circuit court of appeals to certify cases.—The jurisdiction of the supreme court to require, by certiorari or otherwise, a case to be certified from the circuit court of appeals to the supreme court for its review and determination, should be exercised only in cases of gravity and importance, or in order to secure uniformity of decision. (American Const. Co. v. Jacksonville, Tampa & Key West, 148 U. S. 372; Forsyth v. Hammond, 166 U. S. 506; United States v. Three Friends, 166 U. S. 1; In re John Woods, 143 U. S. 202; Lau Ow Bew, 144 U. S. 47; Smith v. Vulcan Iron Works, 165 U. S. 518.) The power of the supreme court to compel the certification of a case to it by the circuit court of appeals is not affected by the condition of the case as it exists in the latter court, but may be exercised before or after any decision by that court, and irrespective of any ruling or determination therein. (Forsyth v. Hammond, 166 U. S. 506.) Certiorari is the proper remedy to review a decision of the circuit court of appeals dismissing, for want

of jurisdiction, a case within the class of cases in which the judgment is made final. (Kingman & Co. v. Western Mfg. Co., 170 U. S. 675; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372.) The effect of a certiorari, when awarded by the supreme court in a case decided by the circuit court of appeals is to suspend any action that might be taken by that court, or by the trial court in obedience to its mandate; but it does not restore jurisdiction to the trial court, nor give such court authority to set aside orders legally and properly made in obedience to the mandate of the circuit court of appeals before the writ of certiorari was awarded. (Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 78 Fed. Rep. 659.) The judgment of the circuit court of appeals need not be a final judgment in order to be reviewed by certiorari; it is within the discretion of the supreme court to determine at what stage of the proceedings the case should be required to be sent up for review. (American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372.) But certiorari should not issue to review an interlocutory order, unless it is necessary to prevent extraordinary inconvenience in the conduct of the cause. (American Const. Co. v. Jacksonville etc. Ry. Co., 148 U. S. 372.) The exclusion of a Chinese merchant under the Chinese exclusion act, notwithstanding satisfactory evidence of his status as a merchant here, presents a question of such importance as will justify the supreme court in requiring the circuit court of appeals to certify the case to it for review. (Lau Ow Bew, 141 U. S. 583.) If the case is one from which an appeal will lie from the circuit court of appeals to the supreme court, certiorari will not issue to review the judgment of the former court. (Re Tampa Suburban Ry. Co., 168 U. S. 583.) The whole case is open for examination when the supreme court issues a

writ of certiorari to bring up the whole record. (Panama Ry. Co. v. Napier Shipping Co., 166 U. S. 280.) The fact that the mandate of the circuit court of appeals has gone down does not preclude a writ of certiorari from the supreme court to review the decision of a circuit court of appeals. (The Conqueror, 166 U. S. 110.) Certiorari will issue to review judgments in contempt proceedings rendered in excess of jurisdiction if there is no other adequate remedy. (Ex parte Chetwood, 165 U. S. 443.) An application for a certiorari to review a decree of the circuit court, entered after the adjournment of the supreme court for the term, is made with reasonable promptness if, during the next term of the court and within a year after the original decree. (The Conqueror, 166 U. S. 110.)

Appeals from circuit court of appeals to supreme court.—The judgment of the circuit court of appeals is not final where the jurisdiction of the circuit court did not depend upon diverse citizenship of parties, but upon the fact that the suit arose under a law of the United States. (Northern Pac. Ry. Co. v. Amato, 144 U. S. 465; Union Pacific Ry. Co. v. Harris, 158 U. S. 326.) A writ of error from the supreme court does not lie to review a judgment of the circuit court of appeals which is not a final judgment, by virtue of the last clause of section 6, act 1891, creating circuit courts of appeals. (MacLeod v. Graven, 47 U. S. App. 573; 79 Fed. Rep. 84; Lutcher v. United States, 157 U. S. 427.) The mandate of the circuit court of appeals which has gone down need not be recalled in order to appeal to the supreme court in cases not final in the circuit court of appeals. (Ritter v. Mutual Life Ins. Co., 39 U. S. App. 189; 72 Fed. Rep. 567.) An appeal will lie to the supreme court in cases not final in the circuit court of appeals, where the matter in controversy exceeds $1,000, besides costs.

(Northern Pac. Ry. Co. v. Amato, 144 U. S. 465; U. S. v. Wanamaker, 147 U. S. 149.) The matter in controversy must have actual value and cannot be supplied on speculation. (Huntington v. Saunders, 163 U. S. 319.) The stipulation of the parties as to the amount in controversy is not controlling, but may be taken into consideration. (U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290.) If the decree fail to specify the sum for which it is given, it is final. (Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353.) An appeal from a decree of a circuit court which affirms its own prior decree in obedience to a mandate from the circuit court of appeals, is not an appeal from the latter court, but from the circuit court, of which the supreme court has no jurisdiction. (Webster v. Daly, 163 U. S. 155.)

Time for appeal.—A rule limiting the time for an appeal is applicable to a case already decided. (Re Philip Hien, 166 U. S. 432.) Where a motion for a rehearing is made in season and entertained by the court the decree does not take final effect for the purposes of an appeal, until the motion is disposed of. (Voorhees v. Noye Mfg. Co., 151 U. S. 135; Aspen Min. & Sm. Co. v. Billings, 150 U. S. 31.)

§ 208. Appeals from Indian Territory direct to supreme court.—Appeals shall be allowed from the United States courts in the Indian Territory direct to the supreme court of the United States to either party in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to

said court in other cases; *provided*, that appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and, in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the supreme court of the United States. In case of appeals, as aforesaid, it shall be the duty of the supreme court to advance such cases on the docket and dispose of the same as early as possible. (30 U. S. Stats. 591.)

§ 209. **Appeals in prize causes.**—An appeal shall be allowed to the supreme court from all final decrees of any district court in prize causes, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed, without reference to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance. And the supreme court shall receive, hear, and determine such appeals, and shall always be open for the entry thereof. (Rev. Stats. sec. 695.) [See sec. 1009.]

Appeals in prize cases.—A new claim cannot be introduced in the supreme court, but may be filed in the circuit court when the cause is remanded. (The Societe, 9 Cranch, 209; The Harrison, 1 Wheat. 298.) Where the facts did not show it to be a prize case, but a case of forfeiture, the case will be remanded.

(U. S. v. Weed, 5 Wall. 62; The Watchful, 6 Wall. 91.) If the district court in a prize case wrongfully allows or denies the order for further proof, and objection is taken, the supreme court can administer the proper relief (The Pizarro, 2 Wheat. 227); so if a claim is dismissed, claimant may appeal (Withenbury v. U. S., 5 Wall. 819); but a party who does not appeal can raise no objection, although another party appeals. (The Amiable Nancy, 3 Wheat. 546.) Where the objection that the libel is not brought in the name of the United States is not raised by the pleadings, it will not be entertained. (Jecker v. Montgomery, 18 How. 111.) A case carried into a circuit court before the act of 1863 is properly here on appeal from the circuit court. (The Admiral, 3 Wall. 603.) Appeal lies from a final decree in a prize cause, and the whole matter in controversy can be disposed of, leaving nothing to be litigated between the parties. (Withenbury v. U. S., 5 Wall. 819.) Where there was no order, decree, or judgment, the appeal will be dismissed. (The Alicia, 7 Wall. 571.)

§ 210. **Appeals in prize causes remaining in circuit courts.**—An appeal shall be allowed to the supreme court from all final decrees of any circuit court in prize causes depending therein on the thirtieth day of June, eighteen hundred and sixty-four, in the same manner and subject to the same conditions as appeals in prize causes for the district courts. (Rev. Stats. sec. 696.)

§ 210 a. **Appellate jurisdiction in bankruptcy cases.**—(a) The supreme court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective

terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The supreme court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States, and from the supreme court of the District of Columbia.

(b) The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved. (30 U. S. Stats. 553, sec. 24.)

§ 210 b. Writs of error and appeals in bankruptcy matters.—(a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be

heard and determined by the appellate court in term and vacation, as the case may be.

(b) From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the supreme court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the supreme court of the United States; or

2. Where some justice of the supreme court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

(c) Trustees shall not be required to give bond when they take appeals or sue out writs of error.

(d) Controversies may be certified to the supreme court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted. (30 U. S. Stats. 553, sec. 25.)

§ 211. **Transcripts on appeal.**—Upon the appeal of any cause in equity, or of admiralty and

maritime jurisdiction, or of prize or no prize, a transcript of the record as directed by law to be made, and copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the supreme court; *provided*, that either the court below or the supreme court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeal no new evidence shall be received in the supreme court except in admiralty and prize causes. [See sec. 750.] (Rev. Stats. sec. 698; 18 U. S. Stats. 316; 1 Sup. Rev. Stats. 135.)

Records.—The certificate of the clerk is prima facie evidence that the record is complete (The Rio Grande, 19 Wall. 178); and his certificate to a deposition contained in the record that it was filed after trial of the cause is of equal validity as if forming part of his original certificate (The Samuel, 1 Wheat. 9); but his certificate cannot be received as evidence that papers were used in the court below and have been lost. (The Grapeshot, 9 Wall. 129; 7 Wall. 563.) The supreme court hears the cause in the first instance upon the evidence transmitted (The London Packet, 2 Wheat. 371); and if the proof is deficient, the cause may be continued with leave to produce further proof. (The Samuel, 1 Wheat. 9.) On motions to dismiss appeals or writs of error it is only necessary to print so much of the record as will enable the court to act understandingly without reference to the transcript. (Carey v. Houston & Texas Cent. Ry. Co., 150 U. S. 170.) It is the duty of appellants to bring

into the supreme court, as part of the record, exceptions taken by them to the master's report. (Belford v. Scribner, 144 U. S. 488.) Where the only errors assigned which call for consideration depend upon the terms and the construction of a contract which does not appear in the record, the judgment will be affirmed. (Red River Cattle Co. v. Alfred Sully, 144 U. S. 209.)

§ 212. Cases where question of jurisdiction only reviewed, without reference to amount.—That in all cases where a final judgment or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the supreme court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars, the supreme court shall not review any question raised upon the record except such question of jurisdiction; such writ of error or appeal shall be taken and allowed under the same provisions of law as apply to other writs of error or appeals, except as provided in the following section. Sec. 2. That in cases of judgments or decrees mentioned in the first section of this act, and heretofore rendered, where the period of limitation for taking writs of error or appeals in other cases has not expired, appeals or writs of error may be sued out at any time within one year after the passage of this act. (Approved Feb. 25, 1889; 25

U. S. Stats. 693.) (Mattingly v. Northwestern Va. R. R. Co., 158 U. S. 53.)

(Mattingly v. Northwestern Va. R. R. Co., 158 U. S. 53.)

Note.—Was the above act repealed by implication by section 5 of the act creating the circuit court of appeals, ante, sec. 175?

§ 213. **Judgment or decree on review.**—The supreme court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court, acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require. The supreme court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereon. (Rev. Stats. sec. 701.)

Review.—The judgment of the circuit court upon a plea to the jurisdiction will not be reviewed upon petition for mandamus. (Ex parte Railway Co., 103 U. S. 794.) The action of the circuit court in refusing to grant an appeal in a habeas corpus case in favor of a prisoner, under judgment of a State court, cannot be revised on application to the supreme court of the United States for such a writ. (Re Boardman, 169 U. S. 39.)

On affirmance.—The circuit court has no power to modify a decree which has been affirmed. (Chaires

v. U. S., 3 How. 611; Southard v. Russell, 16 How. 547.) So on affirmance of a decree dismissing the bill. (Durant v. Essex Co., 101 U. S. 555.) Persons not parties to a decree of distribution, who appear after decree affirmed, may claim their share therein. (Ex parte Howard, 9 Wall. 175.) There being in a case separate sentences of concurrent imprisonment under each of two counts of the indictment, the supreme court on affirmance as to one, and reversing as to the other, remits the case to the lower court for further proceedings, instead of ordering a new trial. (Putnam v. United States, 162 U. S. 687.) If a State court proceeds before the mandate of affirmance issues from the supreme court, its action, though not to be commended, is not void. (Re Boardman, 169 U. S. 39.)

On reversal.—If the judgment be reversed and judgment for defendant be entered, the circuit court cannot grant a new trial (Ex parte Dubuque & Pac. R., 1 Wall. 69); and if reversed with directions to enter judgment for plaintiff in error, judgment should be enforced with costs. (McKnight v. Craig, 6 Cranch, 183.) On a special finding before the court without a jury, the circuit court on reversal may proceed to try other issues. (Ex parte French, 91 U. S. 423.) If no supersedeas has been obtained, a reversal will not vacate a sale under a decree. (South Fork Canal Co. v. Gordon, 2 Abb. U. S. 479; Fed. Cas. No. 13189.) A reversal which directs restitution of money must be obeyed as far as practicable by the distributees. (Ex parte Morris, 9 Wall. 605.) Entry of the proper judgment below will be directed on reversing a decision in a case heard upon an agreed statement of facts (Meyer v. Richards, 163 U. S. 385), but the appellate court can only direct such judgment as is authorized by the facts specially found by the circuit court. (Pullman Palace Car Co. v. Metropoli-

tan Street Ry. Co., 157 U. S. 94.) Questions finally settled by the supreme court cannot be reconsidered by the lower court, but must be deemed to have been finally settled. (Re C. & A. Potts & Co., 166 U. S. 263.)

Proceedings after mandate.—Where the mandate requires only the execution of the decree, the circuit court is bound thereby, although the jurisdiction is not alleged in the pleadings (Skillern v. May, 6 Cranch, 267); but where the mandate is uncertain and ambiguous, it has a right to resort to the opinion delivered at the time to assist in expounding it. (West v. Brashear, 14 Peters, 51.) The inferior court is bound by the decree of the supreme court, and must carry it into execution according to the mandate. (Sibbald v. United States, 12 Peters, 488; West v. Brashear, 14 Peters, 51; Gaines v. Rugg, 148 U. S. 228.) When the direction in the mandate is precise and unambiguous, it is the duty of the circuit court to carry it into execution. (West v. Brashear, 14 Peters, 51.) On demurrer overruled by the supreme court, the party will not be permitted to file other demurrers after the remand. (Hitchcock v. Galveston, 3 Woods, 269; Fed. Cas. No. 6533.) The allowance of a supplemental answer after mandate is in the discretion of the court. (Williams v. Gibbes, 20 How. 535.) So the claimant in collusion may amend his answer after return of mandate. (The Pennsylvania, 12 Blatchf. 67; Fed. Cas. No. 10951.) A party cannot file new pleadings if the rights of the parties are finally determined. (Stewart v. Salamon, 97 U. S. 361.) The mandate in case of a vessel released on stipulation in the district court operates without any appeal to the supreme court. (The Lady Pike, 96 U. S. 461; see Ex parte Sawyer, 21 Wall. 235.) Attachment cannot be issued for refusal to obey the

original judgment awarding a mandamus, but an alias writ will be issued. (United States v. Kendall, 5 Cranch C. C. 385; Fed. Cas. No. 15418.) Costs may be taxed after receipt of mandate, and be entered nunc pro tunc. (Sizer v. Many, 16 How. 98.) If the State Court, after judgment in the supreme court, proceeds before the mandate of affirmance issues from the supreme court its action, though not to be commended, is not void. (Re Boardman, 169 U. S. 39.) In ordinary cases a new trial cannot be granted by the court below in entering the judgment of the supreme court. (Smale v. Mitchell, 143 U. S. 99.)

Second appeals.—An appeal from a decree entered by the court below in accordance with the mandate of the appellate court, cannot be maintained. (Aspen M. & S. Co. v. Billings, 150 U. S. 31.) Whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. (Thompson v. Maxwell Land Grant Co., 168 U. S. 451.) One who does not appeal from a decree is not entitled on an appeal from a decree of affirmance to contest a provision of the original, which is merely affirmed by the latter. (Harrison v. Perea, 168 U. S. 311.)

§ 213a. **Remanding causes.**—Whenever on appeal or writ of error, or otherwise, a case coming directly from the district court or existing circuit court shall be reviewed and determined in the supreme court, the cause shall be remanded to the proper district or circuit court for further proceedings, to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise, a case coming from a circuit court of appeals shall be reviewed and determined in the

supreme court, the cause shall be remanded by the supreme court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise, a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final, such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination. (26 U. S. Stats. 829, sec. 10.)

Remanding cause by appellate court.—An appellate court has no power to remand except for the purpose of giving effect to some judgment of its own, and hence it cannot remand a suit in equity merely for the purpose of a rehearing of a cause in the court below in view of new matter to be produced by the defeated party. (Marden v. Campbell P. P. & Mfg. Co., 33 U. S. App. 123; 67 Fed. Rep. 809.) The circuit court of appeals can act upon the court below only by mandate. (North Bloomfield G. M. Co. v. United States, 48 U. S. App. 755; 83 Fed. Rep. 2.) When on the coming down of the mandate the court enters a judgment against the sureties on the supersedeas bond, such judgment should be for the amount of the original judgment with interest and costs; it is erroneous to compute the interest to date and then enter judgment for the full amount. (Gordon v. Third Nat. Bank, 3 U. S. App. 554; 56 Fed. Rep. 790.) If the appellate court commits an error in failing to give the successful party costs, it should be corrected by motion in the appellate court before the mandate issues. (State of California, 7

U. S. App. 652; 54 Fed. Rep. 404.) Except in a very plain case restitution of money paid under an erroneous decree will not be directed by the appellate court where the interests of the parties defendant may be diverse; but leave will be reserved in the mandate to present a petition for restitution to the Court below. (Andrews v. Thum, 33 U. S. App. 393; 71 Fed. Rep. 763.) The circuit court will, upon writ of error, remand a case which has been brought within the jurisdiction by means of collusion, where the proof is clear; when the proof is not clear, on reversing the judgment, the court will direct the trial and determination of that question at the circuit. (Ashley v. Board of Supervisors, 16 U. S. App. 656; 60 Fed. Rep. 55.) A judgment which has been affirmed stands in the same position after mandate is sent down that it did before the writ of error was allowed. (Nelson v. First Nat. Bank, 70 Fed. Rep. 526.) A court engaged in the regular trial of cases on a day not a motion day is not bound to drop all business and immediately grant a motion for judgment in accordance with the mandate of a higher court on reversal. (Re Joseph Hall, 167 U. S. 38.) Whatever is before the appellate court and is disposed of by virtue of the appeal becomes the law of the case, and the lower court must carry it into execution according to the mandate without power to modify, reverse, enlarge, or suspend it. (Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 43 U. S. App. 47; 72 Fed. Rep. 545.)

Rehearing after mandate.—After a federal appellate court has passed upon all the issues before it and finally disposed of the case, the court below has no power to subsequently entertain a bill of review based on newly discovered evidence unless the mandate gives such privilege. (In re Gamewell Fire Alarm T. Co., 33 U. S. App. 452; 73 Fed. Rep. 908.)

But if the appeal was from an interlocutory decree, a rehearing may be allowed, after mandate, by the trial court. (C. & A. Potts & Co. v. Creagher, 71 Fed. Rep. 574.) The appellate court may ordinarily entertain an original petition for leave to file in the court below a bill of review or supplemental bill in the nature of a bill of review, even after the close of the term at which the judgment was entered. (In re Gamewell Fire Alarm Tel. Co., 33 U. S. App. 452; 73 Fed. Rep. 908.) It is too late to question the jurisdiction of the circuit court after a return of a mandate from the circuit court of appeals. (Billings v. Aspen Min. & Smelting Co., 53 Fed. Rep. 561.)

Appeal from decree on mandate.—Where the judgment or decree upon the mandate of an appellate court determines questions not covered thereby, it is subject to review by appeal or writ of error in the proper appellate court. (Metcalf v. City of Watertown, 34 U. S. App. 107; 68 Fed. Rep. 859; Laidlaw v. Oregon Ry. & Nav. Co., 48 U. S. App. 430; 81 Fed. Rep. 876.) In such case the second writ of error brings up nothing for review but the proceedings subsequent to the mandate. (Republican Min. Co. v. Tyler M. Co., 48 U. S. App. 213; 79 Fed. Rep. 733.) Where the supreme court decides that the circuit court has jurisdiction of a cause, and remands the same for further proceedings, the circuit court of appeals cannot, on a subsequent appeal, reopen the question of jurisdiction. (Nashua & L. R. Corp. v. Boston & L. R. Corp., 5 U. S. App. 97; 51 Fed. Rep. 929.) An appellate court should not ordinarily entertain an appeal from a decree entered in pursuance of a mandate from the circuit court of appeals when no errors are assigned as to matters arising subsequent to the mandate. (Gregory v. Pike, 33 U. S.

App. 700; 77 Fed. Rep. 241; Merrill v. National Bank of Jacksonville, 41 U. S. App. 645; 78 Fed. Rep. 208.)

§ 214. **Writs of error and appeals from Territorial courts.**—No appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute shall exceed the sum of five thousand dollars. This section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute. (23 U. S. Stats. 355.)

Appeal from supreme court of territory, in general.—An appeal lies to the supreme court from the judgments or decrees of the supreme courts of the territories, except in cases where the judgments of the circuit court of appeals are made final. (Shute v. Keyser, 149 U. S. 649.) If the supreme court of the territory correctly reversed the decree of the district court, its decree will be affirmed. (U. S. v. Hart, 6 Wall. 770.) In order that the supreme court may take jurisdiction it must appear on the record that the question was raised and decided in the lower court. (Lownsdale v. Parrish, 21 How. 290.) Where the question relates merely to the counting of the votes for the removal of a county seat, the value of the interest cannot be computed. (Potts v. Chumasero, 92 U. S. 358.) A case in equity may be taken

up by appeal, although it was removed into the supreme court of the territory by writ of error. (Brewster v. Wakefield, 22 How. 118.) A proceeding for allotment of dower in a law action cannot be taken by appeal, although not carried on according to the forms of the common law. (Parish v. Ellis, 16 Peters, 451.) A mortgagor may appeal alone from a decree directing a foreclosure, and subsequent lien-holders need not join. (Brewster v. Wakefield, 22 How. 118.) If neither party had any interest in the property in dispute, no appeal can be taken. (Lowusdale v. Parrish, 21 How. 290.) On an appeal from the supreme court of a territory the supreme court cannot examine the evidence as to its weight or sufficiency, and the findings of fact are conclusive upon the supreme court. (Holloway v. Dunham, 170 U. S. 615; Harrison v. Perea, 168 U. S. 311; San Pedro & Canon Agua Co., 146 U. S. 120.) Where there are no exceptions to rulings on the admission or rejection of evidence the supreme court is limited to a decision as to whether the facts found are sufficient to sustain the judgment rendered. (Gildersleeve v. New Mexico Min. Co., 161 U. S. 573; Haws v. Victoria M. Co., 160 U. S. 303; Harrison v. Perea, 168 U. S. 311; Karrick v. Hannaman, 168 U. S. 328; San Pedro & Canon Agua Co., 146 U. S. 120; Wasatch Min. Co. v. Crescent Min. Co., 148 U. S. 293; The Blue Jacket v. Tacoma Mill Co., 144 U. S. 371; Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co., 151 U. S. 447.) The right of appeal to the supreme court from a final order made by the supreme court of a territory in a habeas corpus case, involving the question of personal freedom, is not repealed by the act of March 3, 1885. (Gonzales v. Cunningham, 164 U. S. 612.) The supreme court has jurisdiction to review a judgment of the supreme court of a territory in which is drawn in question the authority of the territory under its

Organic Act to extend its taxing power over a reservation created by act of Congress, within its limits. (Maricopa & Phoeniz R. Co. v. Territory of Arizona, 156 U. S. 347.) Unless a manifest error is disclosed, the supreme court will not disturb a decision of the supreme court of a territory construing a local statute. (Fox v. Haarstick, 156 U. S. 674.)

(1) **Writ of error.**—No writ of error lies from a territorial court to the supreme court unless some act of Congress provides therefor (Clarke v. Bazadone, 1 Cranch, 212), and the action of a territorial court refusing to set aside a judgment by default is not reviewable. (McAllister v. Kuhn, 96 U. S. 87; see Kerr v. Clampitt, 95 U. S. 188.) A writ of error does not lie to an order refusing a motion for a new trial (Leitensdorfer v. Webb, 20 How. 176; Sparrow v. Strong, 4 Wall. 584); nor to a judgment reversing a judgment with instructions to award a venire facias de novo. (Brown v. Union Bank, 4 How. 465.) A writ of error to an order setting aside a return to an execution will not lie. (Wells v. McGregor, 13 Wall. 188.) A judgment sustaining a demurrer or a judgment affirming such decision is not final if it awards a precedendo. (Holcomb v. McCusick, 20 How. 552; Miners' Bank v. U. S., 5 How. 213.) A writ of error in an attachment suit will not bring up for review upon points necessary to sustain the attachment (Leitensdorfer v. Webb, 20 How. 176); nor will it lie when the only dispute is a counter-claim, if the amount is less than one thousand dollars. (Nagle v. Rutledge, 100 U. S. 675.) A petition for rehearing in the court below presents no question for review in the supreme court. (San Pedro & Canon Del Agua Co. v. United States, 146 U. S. 120.)

(2) **Jurisdictional amount.**—The supreme court has not jurisdiction of an appeal from a territorial court,

unless the matter in dispute, exclusive of costs, exceeds the sum of $5,000, or there is involved the validity of a patent or copyright, or unless a Federal question is involved. (Linford v. Ellison, 155 U. S. 503.) The liability for $5,000 each, of several defendants, subscribers to stock of a corporation, cannot give jurisdiction on appeal to the supreme court from a territorial court, although they contend that their subscriptions were paid by a conveyance of land owned jointly by them. (Wilson v. Kiesel, 164 U. S. 248.) Although the judgment of the territorial district court was less than $5,000, if at the time of its affirmance in the territorial supreme court, it amounted with interest to over $5,000, the supreme court has jurisdiction. (Benson Min. & S. Co. v. Alta M. & S. Co., 145 U. S. 428.)

§ 215. **Utah.**—A writ of error from the supreme court of the United States to the supreme court of the Territory shall lie in criminal cases where the accused shall have been sentenced to capital punishment or convicted of bigamy or polygamy. (18 U. S. Stats. 254; 1 Sup. Rev. Stats. 108.) From all judgments and decrees of the supreme court of the Territory, mentioned in this act, in any case arising within the limits of the proposed State prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the supreme court of the United States as they shall have had by law prior to the admission of said State into the Union. (28 U. S. Stats. 111.)

§ 216. **Territorial courts — Procedure on appeal.**—That the appellate jurisdiction of the su-

preme court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said supreme court have prescribed or may hereafter prescribe; *provided*, that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the supreme court, together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said supreme court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal; and provided, further, that the appellate court may make any order in any case heretofore appealed, which may be necessary to save the rights of the parties; and that this act shall not apply to cases now pending in the supreme court of the United States where the record has already been filed. (18 U. S. Stats. 27; 1 Sup. Rev. Stats. 12.)

Note.—To entitle to an appeal, the case must be one tried by a jury. (Stringfellow v. Cain, 99 U. S. 610; Cannon v. Pratt, 99 U. S. 619.) If the territorial supreme court affirms the judgment, it adopts the findings as its own for the purpose of an appeal (Stringfellow v. Cain, 99 U. S. 610; Cannon v. Pratt, 99 U. S. 619); but if it reverses the judgment, it

should make other findings, so that the case may be taken on appeal. (Stringfellow v. Cain, 99 U. S. 610.)

§ 217. When a Territory becomes a State after judgment or decree in Territorial court.—In all cases where the judgment or decree of any court of a Territory might be reviewed by the supreme court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such Territory has, after such judgment or decree, been admitted as a State; and the supreme court shall direct the mandate to such court as the nature of the writ of error or appeal requires. (Rev. Stats. sec. 703.)

It rests with Congress to declare how the judgments of territorial courts shall be carried into execution, or reviewed upon appeal or writ of error (Hunt v. Palao, 4 How. 589; Benner v. Porter, 9 How. 235); but concurrent legislation, State and Federal, is necessary in respect to cases pending in the supreme court for review to enable the supreme court to send down the mandate for further proceedings in the proper tribunal. (Benner v. Porter, 9 How. 235.) After a territory has been admitted as a State, no writ of error or appeal lies from the territorial court without the aid of some act of Congress. (Hunt v. Palao, 4 How. 589; Sheppard v. Wilson, 5 How. 210; McNulty v. Batty, 10 How. 72; Preston v. Bracken, 10 How. 81. See Freeborn v. Smith, 2 Wall. 160; Northern Pac. Ry. Co. v. Holmes, 155 U. S. 137.)

§ 218. Judgments and decrees of district courts in cases transferred from Territorial courts.—The

judgments or decrees of any district court, in cases transferred to it from the superior court of any Territory upon the admission of such Territory as a State, under sections five hundred and sixty-seven and five hundred and sixty-eight, may be reviewed and reversed or affirmed upon writs of error sued out of, or appeals taken to, the supreme court, in the same manner as if such judgments or decrees had been rendered in said superior court of such Territory. And the mandates and all writs necessary to the exercise of the appellate jurisdiction of the supreme court in such cases shall be directed to such district court, which shall cause the same to be duly executed and obeyed. (Rev. Stats. sec. 704. See sections 567 and 569.)

§ 219. **Judgments and decrees of court of appeals of District of Columbia.**—Any final judgment or decree of the said court of appeals may be reexamined and affirmed, reversed or modified by the supreme court of the United States, upon writ of error or appeal in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority

exercised under, the United States. (27 U. S. Stats. 436.)

Amount.—If the matter in dispute is incapable of being reduced to a pecuniary standard of value, the supreme court will not review a decision of the court of appeals of the District of Columbia. (Perrine v. Slack, 164 U. S. 452.) The supreme court cannot review a decision of the court of appeals of the District of Columbia in a criminal case. (Chapman v. United States, 164 U. S. 436.)

§ 220. **Certiorari from supreme court to court of appeals of District of Columbia.**—That in any case heretofore made final in the court of appeals of the District of Columbia it shall be competent for the supreme court to require, by certiorari or otherwise, any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court. (29 U. S. Stats. 692.)

§ 221. **Appeals from the court of claims.**—An appeal to the supreme court shall be allowed on behalf of the United States, from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine. (Rev. Stats. sec. 707.)

Appeals from court of claims.—An appeal is a matter of right which the court cannot prevent and which a party may exercise at his own volition. (United States v. Adams, 6 Wall. 103.) The United States may appeal from an adverse judgment of the court of claims where that court is by law required to take jurisdiction of a claim against it and judicially determine the case. (Vigo's Case, 21 Wall. 648; Ex parte Zellner, 9 Wall. 244.) So when a claim is referred to the court of claims by a joint resolution (Dickelman v. United States, 9 Ct. of Cl. 320); but if a claim is merely referred by act of Congress to ascertain a particular fact to guide the United States in the execution of its treaty stipulations, an appeal will not lie. (Ex parte Atocha, 17 Wall. 439.) An appeal will not lie from order passed upon a change of attorneys (Dismare v. United States, 9 Ct. of Cl. 1); or an order refusing a new trial. (Ex parte Russell, 13 Wall. 664.) When equitable jurisdiction is conferred in a special case by a special act, no statement of facts on appeal is necessary, this section not applying to such case. (Harvey v. United States, 4 Morr. Trans. 699.) When the United States appeals, only the claim allowed is brought up. (United States v. Hickey, 17 Wall. 9.) When the court of claims fails to find a material fact, the judgment will be reversed; or when the amount that the party is entitled to recover is not set out in the findings (United States v. Clark, 94 U. S. 73); and a refusal to find a material fact may be excepted to. (United States v. Adams, 9 Wall. 661.) In the exercise of its general jurisdiction appeals lie to the supreme court from judgments of the court of claims. (United States v. Jones, 119 U. S. 477.) An appeal taken before the right of appeal has expired is not vacated by the appropriation by Congress of the amount necessary to

pay the judgment. (United States v. Jones, 119 U. S. 477.) This section authorizes an appeal to this court in behalf of the United States from all judgments of the court of claims adverse to the United States. (United States v. Mosby, 133 U. S. 273; United States v. Davis, 131 U. S. 36.) Neither the court of claims nor the supreme court of the United States can determine any claim against the United States, except in cases defined by Congress. (United States v. Gleeson, 124 U. S. 255.)

Under this section of the Revised Statutes, no appeal lies from a judgment of the court of claims against the United States, "pro forma for purpose of appeal," for less than $3,000. (United States v. Gleeson, 124 U. S. 255.) Nothing can be reviewed on appeal but questions of law. (Mahan v. United States, 14 Wall. 109; Talbert v. United States, 155 U. S. 45.) The judgment of the court of claims as to the legal effect of the ultimate circumstantial facts in a case may be reviewed in the supreme court. (United States v. Pugh, 99 U. S. 265.) The rule with regard to findings of fact has no reference to a case of equity jurisdiction conferred by a special act. In such case, where appeal lies, this court must review the facts and the law as in other equity cases appealed from. (Harvey v. United States, 105 U. S. 671.) If the court of claims refuses to find as prayed, the prayer and refusal must be made part of the record, that the court may determine whether to send it back for a finding. (Hahan v. United States, 14 Wall. 109.) Where it does not find the amount of loss, its judgment will be reversed on account of an insufficient finding. (United States v. Clark, 94 U. S. 73.) Where it sounds all the evidence, but there was no legal evidence to establish such fact, this court must reverse the judgment. (United States v. Clark, 96 U. S. 37.)

The supreme court cannot give the court of claims any directions as to what finding it shall make. (United States v. Child ["United States v. Adams"], 9 Wall. 661.) Under act of 1894 see United States v. Gilliat, 164 U. S. 42.)

§ 222. **Time and manner of appeals from the court of claims.**—All appeals from the court of claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the supreme court may direct. (Rev. Stats. sec. 708.)

Appeals from court of claims.—The limitation ceases to run from the time of application for an appeal, and subsequent delays will not prejudice the party. (United States v. Adams, 6 Wall. 101.) Such appeals must be taken within ninety days after the judgment is rendered, but this period is enlarged to six months by section 10 of the act in question. In our judgment, the same right can be exercised by the United States in any case of the prosecution of a claim in the district or circuit courts of the United States under said act. (United States v. Davis, 131 U. S. 36.)

§ 223. **Judgments and decrees of State courts on writs of error.**—A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity, or where is drawn in question the validity, of a statute of, or an authority exercised under, any State on the

ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity, specially set apart or claimed by either party, under such Constitution, treaty, statute, commission or authority —may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The supreme court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ. (Rev. Stats. sec. 709.)

Review of State Decisions.—Jurisdiction is not conferred by consent. (Mills v. Brown, 16 Peters, 525.) A writ of error from the supreme court to review a state judgment can only be maintained under the circumstances defined in section 709 of the Revised Statutes. (Duncan v. State of Missouri, 152 U. S. 377.) A judgment of an inferior State court which is the highest court of the State in which a decision can be had, because a writ of error has been denied by the supreme court of the State, can be reviewed if it involves a Federal question, decided against plaintiff in error, by writ of error from the supreme court of the United States. (Bacon v. States of Texas, 163 U. S.

207; Bergemann v. Backer, 157 U. S. 655.) A writ of error to a State court brings before the supreme court only the Federal question in the case. (Ashley v. Ryan, 153 U. S. 436.) The supreme court must determine for itself whether the suit really involves any federal question which will entitle it to review the judgment of the State court. (Newport Light Co. v. City of Newport, 151 U. S. 527.) It is requisite that it should be apparent in the record that one of the questions arose, and that a decision was made thereon. (Crowell v. Randall, 10 Peters, 368.) The allegation that a treaty has been misconstrued, in refusing to sanction a claim, is not sufficient (Chouteau v. Marguerite, 12 Peters, 507), or a decision in accordance with the practice of the State court. (Commercial Bk. v. Rochester, 15 Wall. 639.) It must appear from the record that the act or Constitution was drawn in question (Miller v. Nicholls, 4 Wheat. 311), or the record should show a complete title under the treaty. (Hickie v. Starke, 1 Peters, 94.) It is sufficient if from the facts stated such a question must have arisen (Harris v. Dennie, 3 Peters, 292), and that the act was misconstrued. (Davis v. Packard, 6 Peters, 41.) The question must appear to have arisen by clear and necessary intendment (Ocean Ins. Co. v. Polleys, 13 Peters, 137), and to have been necessarily involved (Armstrong v. Treasurer, 16 Peters, 281; Mills v. Brown, 16 Peters, 525), so that the State court could not have given judgment without deciding it (Davis v. Texas, 139 U. S. 651; Johnson v. Risk, 137 U. S. 300; California Powder Works v. Davis, 151 U. S. 389; Winter v. Montgomery, 156 U. S. 385; Parmelee v. Lawrence, 11 Wall. 36; Railroad Co. v. Rock, 4 Wall. 177, and that the question was decided in the State court. (Commercial Bank v. Buckingham, 5 How. 317; Smith v. Hunter, 7 How.

738; Taylor v. Morton, 2 Black, 481; Cockroft v. Vose, 14 Wall. 5; Fowler v. Lamson, 164 U. S. 252; McNulty v. People of California, 149 U. S. 645; Morrison v. Watson, 154 U. S. 111.) Neither the argument of counsel nor the opinion of the court below can be looked to for this purpose. (Gibson v. Chouteau, 8 Wall. 314.) It will not be entertained if the judgment may have been given on grounds which that section does not make cause for error (Steines v. Franklin Co., 14 Wall. 15; Kennebec R. R. v. Portland R. R., 14 Wall. 23); as on the construction of a State statute. (Insurance Co. v. The Treasurer, 11 Wall. 204.) It extends to rights protected by the Constitution. (New Orleans v. De Armas, 9 Peters, 224.) Under this section, the jurisdiction of the supreme court depends upon the question involved, and not upon the citizenship of the parties. (French v. Hopkins, 124 U. S. 524.) The jurisdiction for review of the judgments of State courts given by this section extends to adverse decisions upon rights and titles claimed under commissions held or authority exercised under the United States, as well as to rights claimed under the Constitution, laws or treaties of the United States. (Carson v. Dunham, 121 U. S. 421. Compare Crescent City etc. Co. v. Butchers' Union Co., 120 U. S. 141; Provident Sav. Soc. v. Ford, 114 U. S. 635.) This section applies only to a writ of error to review a final judgment or decree on a suit in the highest court of a State. (Farnsworth v. Territory of Montana, 129 U. S. 104.) These sections do not cover a criminal case. (Snow v. United States, 118 U. S. 346.) Section 709 points out the cases in which the judgment or decree of the highest court of a State may be reviewed by the supreme court of the United States. (McKenna v. Simpson, 129 U. S. 506.) Jurisdiction under this section does not depend upon

the citizenship of the parties, but on the questions involved. (French v. Hopkins, 124 U. S. 524.) The supreme court can review such a judgment only when the right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States was specially set up or claimed in the State court at the proper time and in the proper way. (Chappell v. Bradshaw, 128 U. S. 132; Leeper v. Texas, 139 U. S. 462; Spies v. Illinois, 123 U. S. 131; Baldwin v. State of Kansas, 129 U. S. 52; Chappell v. Bradshaw, 128 U. S. 132; 132 U. S. 369; Leeper v. Texas, 139 U. S. 462; Brown v. Commonwealth of Mass., 144 U. S. 573; Duncan v. State of Missouri, 152 U. S. 377; Morrison v. Watson, 154 U. S. 111; Bobb v. Jamison, 155 U. S. 416; Winona & St. Peters L. Co. v. State of Minnesota, 159 U. S. 540; Re Buchanan, 158 U. S. 31); and the right so set up must have been denied, either expressly or by necessary implication. (Roby v. Colehour, 146 U. S. 153; Israel v. Arthur, 152 U. S. 355; Snell v. City of Chicago, 152 U. S. 191; Dower v. Richards, 151 U. S. 658; California Powder Works v. Davis, 151 U. S. 389; The Schuyler Nat. Bank v. Bollong, 150 U. S. 85; Winter v. City Council of Montgomery, 156 U. S. 385; Missouri v. Andriano, 138 U. S. 497; Reddall v. Bryan, 24 How. 420.) The question must have been raised before judgment in the court below. (Miller v. Cornwall R. R. Co., 168 U. S. 131; Union Mutual Life Ins. Co. v. Kirchoff, 169 U. S. 103; Bushnell v. Crooke M. & S. Co., 148 U. S. 682.) It is essential to the exercise by this court of revisory jurisdiction over the final judgments or decrees of the courts of the States that the writ of error should be allowed either by a justice of this court, or by the proper judge of the State court, after ascertaining by an examination of the record that a question cognizable here was made and

decided in the State court, and that such allowance was justified. (Gleason v. Florida, 9 Wall. 779; Butler v. Gage, 138 U. S. 52; Havnor v. State of New York, 170 U. S. 408; In re Robertson, 156 U. S. 183.) The only appellate jurisdiction to review State judgments at law or in equity is by writ of error. (Dower v. Richards, 151 U. S. 658.) To review the decision of the State court upon a question of fact is not within the jurisdiction of the supreme court. (Dower v. Richards, 151 U. S. 658; Bartlett v. Lockwood, 160 U. S. 357; Egan v. Hart, 165 U. S. 188; Lloyd v. Matthews, 155 U. S. 222; Hedrick v. Atchison T. & Santa Fe Ry. Co., 167 U. S. 673); and this is so even though a Federal question might arise if the question of fact were decided in a particular way. (Israel v. Arthur, 152 U. S. 355.) It matters not that the judgment, denying the right, was rendered in a mandamus proceeding. (McPherson v. Blacker, 146 U. S. 1.) The decision must be a final one (Oxley Stave Co. v. County of Butler, 166 U. S. 648), or the writ will be dismissed. (Drake v. Kochersperger, 170 U. S. 303.) An order made upon a return to a writ of habeas corpus granted by a judge, and returnable before him, does not constitute a final judgment or decree which may be reviewed by the supreme court. (Clarke v. McDade, 165 U. S. 168.) Neither is a judgment of the supreme court of a State final which reverses an order overruling a demurrer, and remands the case for further proceedings. (Great Western Tel. Co. v. Burnham, 162 U. S. 339; Union Mut. L. Ins. Co. v. Kirchoff, 160 U. S. 374.) The decision of the highest court of a State ordering a lower State court to discharge a rule for contempt is not a final judgment (Newport Light Co v. City of Newport, 151 U. S. 527); neither is an order overruling a motion to quash an execution. (Loeber v. Schroeder, 149 U. S. 580.) Where the State supreme court of the State

remanded a cause for further proceedings, the judgment was not final (Rice v. Sanger, 144 U. S. 197); neither is the judgment of the State supreme court merely affirming an interlocutory order of the lower court. (Meagher v. Minnesota Mfg. Co., 145 U. S. 608.) An order of a State judge at chambers in a habeas corpus case is not reviewable. (McKnight v. James, 155 U. S. 685.) Where the case was decided on an independent ground broad enough to maintain the judgment, and not involving a Federal question, this court will dismiss the writ of error without considering the Federal question. (Beatty v. Benton, 135 U. S. 244; Marrow v. Brinkley, 129 U. S. 178; Hale v. Akers, 132 U. S. 554; San Francisco v. Itsell, 133 U. S. 65; Hopkins v. McLure, 133 U. S. 380; Hale v. Akers, 132 U. S. 554.) This principle has since been repeatedly applied as in Jenkins v. Lowenthal, 110 U. S. 222; Murdock v. City of Memphis, 20 Wall. 590, 636; McManus v. O'Sullivan, 91 U. S. 578; Brown v. Atwell, 92 U. S. 327; Citizens' Bank v. Board of Liquidation, 98 U. S. 140; Chouteau v. Gibson, 111 U. S. 200; Adams Co. v. Burlington & M. R. Co., 112 U. S. 123; Detroit City Ry. v. Guthard, 114 U. S. 133; New Orleans Water Works Co. v. La. Sugar Réf. Co., 125 U. S. 18; De Saussure v. Gaillard, 127 U. S. 216, 234; Beaupre v. Noyes, 138 U. S. 397; Hale v. Akers, 132 U. S. 554; Enstis v. Bolles, 150 U. S. 361; Hammond v. Conn. Mut. Life Ins. Co., 150 U. S. 633; Haley v. Breeze, 144 U. S. 130; Northern Pac. Ry. Co. v. Ellis, 144 U. S. 458; Castillo v. McConnico, 168 U. S. 674; Egan v. Hart, 165 U. S. 188; Gillis v. Stinchfield, 159 U. S. 658; Rutland R. R. Co. v. Cent. Vt. R. R. Co., 159 U. S. 630; Bacon v. State of Texas, 163 U. S. 207; Seneca Nation v. Christy, 162 U. S. 283; Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556; Chemical Nat. Bank v. City Bank of Portage, 160 U. S. 646; State of Connecticut v. Woodruff, 153 U. S. 689; State

of Michigan v. Flint & P. M. R. Coo., 152 U. S. 363; Dower v. Richards, 151 U. S. 658; California Powder Works v. Davis, 151 U. S. 389; Wells v. Goodnow's Admrs., 150 U. S. 84; Rector v. Ashley, 6 Wall. 142.) This court has no jurisdiction to review a judgment of the highest court of a State, unless a Federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error. (New Orleans Water Works v. Louisiana Sugar Ref. Co., 125 U. S. 18; De Saussure v. Gaillard, 127 U. S. 216; Hale v. Akers, 132 U. S. 554; San Francisco v. Itsell, 133 U. S. 65; Missouri v. Andriano, 138 U. S. 497.) The party's right must have depended on the statute. (Williams v. Norris, 12 Wheat. 117; Montgomery v. Hernandez, 12 Wheat. 129; Ryan v. Thomas, 4 Wall. 603.) It is not necessary to state in terms upon the record that the law was drawn in question, it is sufficient if it shows that the law must have been misconstrued or the decision could not have been made. (Willson v. Marsh Co., 2 Peters, 245; Furman v. Nichol, 8 Wall. 44; Satterlee v. Matthewson, 2 Peters. 380; Jackson v. Lamphire, 3 Peters, 280.) When the decision is against the right claimed under the Constitution or laws of the United States, a writ of error will lie to bring the judgment of the State court before this court for re-examination and revision. (Ableman v. Booth, 21 How. 506.) The statute must be specially set up by the party, and the decision must be against the claim (Montgomery v. Hernandez, 12 Wheat. 129); but the point must be raised and decided against the party applying for the writ in the State court to which the writ is directed. (Farney v. Towle, 1 Black. 350.) The point must be distinctly raised in the court below (Hoyt v. Shelden, 1 Black, 518; Yesler v. Board of Harbor Commrs., 146 U. S. 646; Morrison v. Watson, 154 U. S. 111; Zadig v. Baldwin, 166 U. S. 485; Oxleg Stave

Co. v. County of Butler, 166 U. S. 648; Kipley v. State of Illinois, 170 U. S. 182); and shown by the record (R. R. Co. v. Rock, 4 Wall. 177; Louisville & N. Ry. Co. v. City of Louisville, 166 U. S. 709; Powell v. Brunswick County, 150 U. S. 433; State of Connecticut v. Woodruff, 153 U. S. 689; Bobb v. Jamison, 155 U. S. 416; Re William Robertson, 156 U. S. 183), which must be properly authenticated. (Caperton v. Ballard, 14 Wall. 238.) Nothing out of the record can be taken into consideration. (Walker v. Villavaso, 6 Wall. 124); not even specifications of error. (Fowler v. Lamson, 164 U. S. 252; Chicago & N. W. Ry. Co. v. City of Chicago, 164 U. S. 454; Clarke v. McDade, 165 U. S. 168; but see Chicago B. & Q. Ry. Co., 166 U. S. 226.) The decision cannot be questioned by the party in whose favor it was given. (Rutland R. R. Co. v. Cent. Vt. R. R. Co., 159 U. S. 630); and the right or immunity must be one of the plaintiff in error and not of a third person. (Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81; Ludeling v. Chaffe, 143 U. S. 301.) A certificate of the presiding justice is not conclusive to show that a Federal question was raised in the case (Caperton v. Bowyer, 14 Wall. 216), nor the record of the judge who tries the case at nisi prius. (Inglee v. Coolidge, 2 Wheat. 363.) Where the decision is made on settled pre-existing rules of general jurisprudence the case cannot be brought here for review (Bank of West Tennessee v. Citizens' Bank, 14 Wall. 9; Palmer v. Marston, 14 Wall. 10; Sevier v. Haskell, 14 Wall. 12; Delmas v. Ins. Co., 14 Wall. 661), nor if decided exclusively upon the principles of the jurisprudence of the State. (Marqueze v. Bloom, 16 Wall. 351.) The jurisdiction is maintainable if the case shows that Federal questions were involved, though it also appears that there were other defenses, if these defenses afford no legal answer to the suit (Maguire v. Tyler, 8 Wall. 651). If the court is the

highest which may consider the question, the right of review exists, although it be not the highest court in the State (Downham v. Alexandria, 9 Wall. 659; Miller v. Joseph, 17 Wall. 655; Bacon v. State of Texas, 163 U. S. 207; Bergemann v. Backer, 157 U. S. 655), and though the case be decided on an equal division. (Hartman v. Greenhow, 102 U. S. 672.) In order to give the supreme court jurisdiction under this section, because of the denial by a State court of any title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that it was duly set up, that the decision was adverse, and was made in the highest court of the State. (Spies v. Illinois, 123 U. S. 132; French v. Hopkins, 124 U. S. 524.) Jurisdiction under this section, for the review of the decision of the highest court of a State, is not dependent upon the citizenship of the parties. The court looks only to the questions involved. (French v. Hopkins, 124 U. S. 524.) If a Federal question is fairly presented by the record, and its decision is necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of this section, as if it had been specifically referred to, and the right directly refused. But if a decision of such a question is rendered unnecessary by the view which the court properly takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review in the supreme court. (Chapman v. Goodnow, 123 U. S. 540.)

Constitution and statutes.—There must be fair color for claiming that rights under the Federal Constitution have been violated in order to give the supreme court jurisdiction to review a State judgment (Wilson v. State of North Carolina, 169 U. S. 586;

Hamblin v. Western Land Co., 147 U. S. 531; St. Louis, G. & F. S. Ry. Co. v. State of Missouri, 156 U. S. 478; Douglas v. Wallace, 161 U. S. 346). A contract can only be impaired within the meaning of Sec. 709. Rev. Stats., by some subsequent statute of the State which has been upheld or given effect by the State court (Bacon v. State of Texas, 163 U. S. 207; Central Land Co. v. Laidley, 159 U. S. 103; McNulty v. People of California, 149 U. S. 645; Winona & St. Peters R. Co. v. Town of Plainview, 143 U. S. 371). Where one construction of the U. S. Constitution or laws will defeat some right, title or immunity of plaintiff in error, and another construction will sustain the right, the case is one arising under the Constitution (Cook v. Avery, 147 U. S. 375; Shively v. Bowlby, 152 U. S. 1; Stanley v. Schwalby, 162 U. S. 255; McCormick v. Market Nat. Bank, 165 U. S. 538). The following questions have been held to arise under the Constitution and laws of the United States, and to bring a case within the jurisdiction of the supreme court to review by writ of error to the State supreme court: Power of national bank to become stockholder in a savings bank (California Bank v. Kennedy, 167 U. S. 362); whether due effect has been given in a State court to the judgment of a court of another State, a Federal court (Central Nat. Bank v. Stevens, 169 U. S. 432; Huntington v. Attrill, 146 U. S. 657; Great Western Tel. Co. v. Purdy, 162 U. S. 329; but see Winona etc. R. Co. v. Plainview, 143 U. S. 371). Whether a given act of Congress or the U. S. Constitution furnish a complete defense to an action to enforce a State statute (Missouri, K. & T. Ry. Co. v. Haber, 169 U. S. 613; Williams v. Eggleston, 170 U. S. 304). Whether an assignee in bankruptcy is entitled to certain property of the bankrupt as against adverse claimants thereto (Dushane v. Beall, 161 U. S. 513; Williams v. Heard, 140 U. S. 529). Whether

levee bonds for a loan of gold coin were invalid because payable in gold coin without express authority of statute to be made so payable (Woodruff v. State of Mississippi, 162 U. S. 291). Whether private property has been taken for any other than a public use (Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112). Whether an equitable title apparently conveyed by proceedings in the U. S. land office was of any effect (Hussman v. Durham, 165 U. S. 144). A Federal question is raised by an unsuccessful contention in a State court that the obligations of a contract have been impaired by State statutes and ordinances, (Chicago B. & Q. R. R. Co. v. State of Neb., 170 U. S. 57; Giozza v. Tiernan, 148 U. S. 657; Mobile & O. R. Co. v. State of Tennessee, 153 U. S. 486; Wilmington & W. R. R. Co.v. Alsbrook, 146 U. S. 279); and by an unsuccessful contention that a State statute deprives defendant of property without due process of law (Tregea v. Modesto Irr. Dist., 164 U. S. 179). If the decision is in favor of the validity of the authority set up and claimed no Federal question is presented (Bartlett v. Lockwood, 160 U. S. 357; Carothers v. Mayer, 164 U. S. 325). If the decision of the State court holds the State statute void as in contravention of the U. S. Constitution, it cannot be reviewed by the supreme court on writ of error (McNulty v. People of California, 149 U. S. 645). The supreme court cannot review any question as to the admission or rejection of evidence in the State court which does not bear directly upon some matter of a Federal nature (Cleveland C. C. & St. L. R. Co. v. Backus, 154 U. S. 439; Central Pac. Ry. Co. v. State of California, 162 U. S. 91). The following questions have been held not to arise under the United States Constitution or laws: Whether a person has the right to practice law in State courts (In re Belva Lockwood, 154 U. S. 116); which of two parties has a right to stock in a national

bank, where the national banking act is only collaterally involved (Leyson v. Davis, 170 U. S. 36); the construction of a State statute of limitations, (Ludeling v. Chaffe, 143 U. S. 301); whether a claim against a national bank was an existing demand at the time the bank suspended (Chemical Bank v. Hartford D. Co., 161 U. S. 1); a question of State practice (Thorington v. City of Montgomery, 147 U. S. 490; Northern Pac. Ry. Co. v. Patterson, 154 U. S. 130; Lambert v. Barrett, 159 U. S. 660); the sufficiency of an indictment found in a State court (Re Robertson, 156 U. S. 183); the denial of an application to amend a petition for removal (Stevens' Adm'r v. Nichols, 157 U. S. 370); the construction of a State statute (Dougherty v. Nevada Bank, 160 U. S. 171; Bacon v. State of Texas, 163 U. S. 207); time when a cause of action accrues under a State statute (Great Western Tel. Co. v. Purdy, 162 U. S. 329).

Where the question is not as to the validity of the Constitution or act but merely as to the application of the same to the case no Federal question is involved (Cameron v. United States, 146 U. S. 533). The question of estoppel and bar by former judgments is not a Federal question (California v. Holladay, 159 U. S. 415). The right of the plaintiff in error is limited to the inquiry whether, in the case presented, the statute is so applied as to deprive him of property without due process of law (Castillo v. McConnico, 168 U. S. 674). In order to sustain a writ of error the record must show that the act of the legislature violates the Constitution of the United States, not merely the State constitution (Levy v. Superior court of San Francisco, 167 U. S. 175; Kipley v. State of Illinois, 170 U. S. 182; Galveston H. & S. A. R. Co. v. State of Texas, 170 U. S. 226; Sage v. Board of Liquidation, 144 U. S. 647; Adams v. Same,

144 U. S. 651). The construction which a State court places upon its own judgments (Newport Light Co. v. City of Newport, 151 U. S. 527).

Under treaty.—(Owings v. Norwood, 5 Cranch, 344; Martin v. Hunter, 1 Wheat. 304; Moreland v. Page, 20 How. 522; Mining Co. v. Boggs, 3 Wall. 304; Maguire v. Tyler, 8 Wall. 650; Ward v. Race Horse, 163 U. S. 504; Budzisz v. Illinois Steel Co., 170 U. S. 41). Right and title to lands. (Gordon v. Caldcleugh, 3 Cranch, 268; Matthews v. Zane, 4 Cranch, 382; McClung v. Silliman, 6 Wheat. 598; Buel v. Van Ness, 8 Wheat. 312; Fulton v. McAffee, 16 Peters, 149; City of Mobile v. Eslava, 16 Peters, 234; Crowell v. Randell, 16 Peters, 368; Chouteau v. Eckhardt, 2 How. 344; McDonough v. Millaudon, 3 How. 693; Walker v. Taylor, 5 How. 64; Scott v. Jones, 5 How. 343; Kennedy v. Hunt, 7 How. 586; Neilson v. Lagow, 7 How. 772; Almonester v. Kenton, 9 How. 1; Doe, ex dem. Barbarie v. Eslava, 9 How. 421; Henderson v. Tennessee, 10 How. 311; Lessieur v. Price, 12 How. 59.) The decision of the supreme court of Louisiana against a right asserted under a treaty presents a question for jurisdiction of this court. (Burthe v. Denis, 133 U. S. 514.) This section is section 25 of the Judiciary Act, reproduced, somewhat enlarged. (Burthe v. Denis, 133 U. S. 514. See Weston v. Charleston, 2 Peters, 449.)

Personal rights.—Right to freedom. (Choteau v. Marguerite 12 Peters, 507; Strader v. Graham, 10 How. 82; Ward v. Race Horse, 163 U. S. 504.) To writ of habeas corpus. (Holmes v. Jennison, 14 Peters, 540.) To religious liberty. (Permoli v. First Municipality, 3 How. 589.)

In criminal cases.—A state may not sue out a writ of error except in a case under and in accordance

with express statutes. (U. S. v. Sanges, 144 U. S. 310.) Where a party under indictment for violation of a State law pleads a license from the United States, and decision of State court is against the license, the United States supreme court has jurisdiction. (McGuire v. Com., 3 Wall. 382.) The reversal of a judgment in a criminal case by State supreme court ordering new trial is not a "final judgment." (Rankin v. State, 11 Wall. 380.) Tax repugnant to United States constitution. (Weston v. Charleston, 2 Peters, 449.) Consideration of a contract. (Craig v. Missouri, 4 Peters, 410.) Not on a State law only. (McBride v. Hoey, 11 Peters, 167; Commercial Bank v. Buckingham, 5 How. 317; Scott v. Jones, 5 How. 343; Congdon v. Goodman, 2 Black, 574; Michigan C. R. Co. v. Michigan S. R. R., 19 How. 379; Withers v. Buckley, 20 How. 84; Beers v. Arkansas, 20 How. 527; Medberry v. Ohio, 24 How. 413; Porter v. Foley, 24 How. 415; Attorney General v. Meeting House, 1 Black, 262; Austin v. The Aldermen, 7 Wall. 694; Worthy v. The Commissioners, 9 Wall. 611.) State decision against execution by United States marshal. (Clements v. Berry, 11 How. 398; Buck v. Colbath, 3 Wall. 334; Sharpe v. Doyle, 102 U. S. 686.) Against validity of an entry of land allowed by United States officers. (Lytle v. Arkansas, 22 How. 193.) Title to land. (Bell v. Hearne, 19 How. 252; Burke v. Gaines, 19 How. 388; Wynn v. Morris, 20 How. 3; Berthold v. McDonald, 23 How. 334; Lanfear v. Hunley, 4 Wall. 205; Carpenter v. Williams, 9 Wall. 785.) Authority of United States marshal. (Buck v. Colbath, 3 Wall. 334.) In insolvency. (Crapo v. Kelly, 16 Wall. 610.) In bankruptcy. (Strader v. Baldwin, 9 How. 261; Calcote v. Stanton, 18 How. 243.) Mexican treaty. (Gill v. Oliver, 11 How. 529.) If the State refuses to carry into effect the mandate of the supreme court, the

latter will proceed to a final decision and award execution (Martin v. Hunter, 1 Wheat. 304), and may send its process to either the appellate or the inferior court of a State. (Williams v. Bruffy, 102 U. S. 248.) The power to review does not extend to statutes passed by Territorial legislatures. (Miners' Bank v. Iowa, 12 How. 1; Messenger v. Mason, 10 Wall. 507.) Questions of evidence. (Mackay v. Dillon, 4 How. 421; White v. Wright, 22 How. 19; Dupasseur v. Rochereau, 21 Wall. 132; Railroad Co. v. Maryland, 21 Wall. 456; Edwards v. Elliott, 21 Wall. 532; Moore v. Mississippi, 21 Wall. 636; Atherton Ex. v. Fowler, 3 Cent. L. J. 60; Long v. Converse, 8 Chic. L. N. 121: S. C. 13 Alb. L. J. 118.

Practice.—Remedy by writ of error. (Verden v. Coleman, 22 How. 192; Webster v. Reid, 11 How. 437.) Right of. (Twitchell v. The Commonwealth, 7 Wall. 321.) Waiver of right. (Erwin v. Lowry, 7 How. 172.) When operates as supersedeas. (O'Dowd v. Russell, 14 Wall. 402; see Hamilton Co. v. Massachusetts, 6 Wall. 632; Tarver v. Keach, 15 Wall. 67; The Victory, 6 Wall. 382.) Remanding cause for further proceedings. (Winn v. Jackson, 12 Wheat. 135; Pepper v. Dunlap, 5 How. 51.) Dismissal. (Christ Church v. Philadelphia, 20 How. 26; Millingar v. Hartupee. 6 Wall. 258; Gleason v. Florida, 9 Wall. 779; Bartemeyer v. Iowa, 14 Wall. 26; Hurley v. Street, 14 Wall. 85; Pennywit v. Eaton, 15 Wall. 380; Stanley v. Schwalby, 162 U. S. 255; Bacon v. State of Texas, 163 U. S. 207; Eustis v. Bolles, 150 U. S. 361.) For defect of parties. (Railroad Co. v. Johnson, 15 Wall. 8.) Interlocutory decree. (Reddall v. Bryan, 24 How. 429.) Final judgment, what is. (Weston v. Charleston, 2 Peters, 449; Olney v. Arnold, 3 Dall. 308.) Adverse party. (Poydras de la Lande v. Treasurer, 17 How. 1.) Writ, to what

court issued. (Miller v. Joseph, 17 Wall. 655; Stanley v. Schwalby, 162 U. S. 255.) When jurisdiction does not attach. (Randall v. Howard, 2 Black, 585; Day v. Gallup, 2 Wall. 97.) When portion of State judgment is correct and separable. (Bank of Commerce v. State of Tennessee, 163 U. S. 416.)

§ 224. Precedence of writs of error to State courts in criminal cases.—Cases on writ of error, to revise the judgment of a State court in any criminal cases, shall have precedence on the docket of the supreme court of all cases to which the government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance. (Rev. Stats. sec. 710.)

CHAPTER XIV.

PROVISIONS COMMON TO MORE THAN ONE COURT OR JUDGE.

§ 225. Exclusive jurisdiction of courts of United States.
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§ 253. Officers forbidden to practice as attorneys.
§ 254. Penalty.
§ 255. Final record—How made.

§ 225 (711). **Exclusive jurisdiction of courts of United States.**—The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States—

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.

Fifth. Of all cases arising under the patent-right or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens. (Rev. Stats. sec. 711.)

Note.—By the statutes of the United States, Federal courts have jurisdiction, exclusive of the courts of the several States, of "all crimes and offenses cognizable under the authority of the United States." (Rev. Stats., sec. 711, cl. 1; Cross v. State, 132 U. S. 132; Thomas v. Loney, 134 U. S. 372.) Section 711 defines the cases in which "the jurisdiction vested in the courts of the United States" shall be "exclusive of the courts of the several States," and among such are "all suits for penalties and forfeitures incurred under the laws of the United States." (First Nat. Bank of Charlotte v. Morgan, 132 U. S. 141.) The criminal jurisdiction of the Federal courts does not extend to the great lakes and their connecting waters. (Ex parte Byers, 32 Fed. Rep. 404.) The common-law rule that qui tam actions on penal statutes do not survive prevails in the Federal courts as to actions on penal statutes of the United States, even in States where the statutes of the State allow suits on State penal statutes after the death of the offender. (Schreiber v. Sharpless, 110 U. S. 76.) A Federal court does not, by virtue of an attachment levy, draw to itself the question of the title of the attached property, so as to prevent the State courts from deciding such question in a suit subsequently brought. (Montgomery v. McDermott, 87 Fed. Rep. 374.)

§ 226 (712). **Oath of United States judges.**—The justices of the supreme court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they pro-

ceed to perform the duties of their respective offices: "I, ————, do solemnly, swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as ——, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God." (Rev. Stats. sec. 712.)

§ 227 (713). **Judges prohibited from practicing law.**—It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. And any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor. (Rev. Stats. sec. 713.)

Note.—Judges are not liable in civil suits for their judicial acts. (Philbrook v. Newman, 85 Fed. Rep. 139.) It is no objection to a judge trying a case that before his appointment he was attorney in other matters for one of the parties. (Carr v. Fife, 156 U. S. 494.)

§ 228 (714). **Judges resigning entitled, in certain cases, to salary for life.**—When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

§ 229 (715). **Criers of the courts—Attendants on juries.**—The circuit and district courts may appoint criers for their courts, to be allowed the sum of two dollars per day, and the marshals may appoint such a number of persons, not exceeding five, as the judges of their respective courts may determine, to attend upon the grand and other juries, and for other necessary purposes, who shall be allowed for their services the sum of two dollars per day, to be paid by and included in the accounts of the marshal, out of any money of the United States in his hands. Such compensation shall be paid only for actual attendance, and when both courts are in session at the same time, only for attendance on one court. (Rev. Stats. sec. 715.)

§ 229 a. **Criers, when deemed in attendance; Vacation.**—That all persons employed under section seven hundred and fifteen of the revised statutes shall be deemed in actual attendance when they attend upon the orders of the courts; no such person shall be employed during vacation. (30 U. S. Stats. 58.)

§ 230. **Property in hands of receiver.**—Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession there-

of. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (25 U. S. Stats. 433, sec. 2.)

Property in possession of receiver.—Where the property in litigation is in the possession of a receiver of the circuit court, such possession draws to it the right to decide conflicting claims to its ultimate possession and control. (Morgan's La. & Tex. R. & S. Co. v. Texas Cent. R. Co., 137 U. S. 171; Milwaukee etc. R. Co. v. Soutter, 2 Wall. 510; People's Bank v. Calhoun, 102 U. S. 256; Krippendorf v. Hyde, 110 U. S. 276.) A receiver appointed before the removal remains in possession until he is removed. (Hinckley v. Railroad Co., 100 U. S. 153.) An attachment suit, being the first levied, was removed to the Federal court, the State court directing the receiver to retain so much of the fund as belonged to that suit and pay the balance into the registry of the State court, which was done. On the failure of the removed attachment in the Federal court, the fund would not be returned to the State court to answer subsequent attachments not removed; but by the receiver should be paid under the order of the State court. (Mack v. Jones, 31 Fed. Rep. 189.) A receiver will be protected in the possession and use of franchises and property committed to him. (Fidelity T. & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. Rep. 687; Sullivan v. Colby, 34 U. S. App. 422; 71 Fed. Rep. 460.) Primary and ancillary receivers. (Wheeling Bridge & T. Ry. Co. v. Cochran, 85 Fed. Rep.

500; Bayne v. Brewer Pottery Co., 82 Fed. Rep. 391; Ames v. Union Pac. Ry. Co., 60 Fed. Rep. 966; Chattanooga T. R. Co. v. Fulton, 69 Fed. Rep. 273.) Extraterritorial jurisdiction of receiver. (See Rogers v. Riley, 80 Fed. Rep. 759.) When receiver should be allowed to sell property. (In re Hall & Stilson Co., 73 Fed. Rep. 527.) Property in hands of receiver is liable to taxation the same as other property, but if a receiver believes the tax illegal he may apply to the court appointing him for protection. (Ex parte Chamberlain, 55 Fed. Rep. 704.) A Federal court in one State cannot reach property in another State by means of a receiver. (Kittel v. Augusta T. & G. Ry. Co., 78 Fed. Rep. 855.) The decision of an appellate court upon a question of business policy with reference to property in hands of its receiver should not be disturbed. (Mercantile Trust Co. v. Farmer's Loan Co., 49 U. S. App. 462; 81 Fed. Rep. 254.) As to compensation of receivers and their attorneys, see Dillingham v. Moran, 00 U. S. App. 000; 81 Rep. Rep. 759; American Loan & T. Co. v. South Atl. & O. Ry. Co., 81 Fed. Rep. 62; Maxwell v. Wilmington Dental Mfg. Co., 82 Fed. Rep. 214; Sowles v. National Union Bank, 82 Fed. Rep. 139; Merchant's Bank of St. Joseph v. Crysler, 32 U. S. App. 187; 67 Fed. Rep. 388.) Receivers of an insolvent corporation represent both the corporation and its creditors and have a right to assert any defense to which the creditors, in contradistinction to the corporation, are entitled. (Hamor v. Taylor-Rice Eng. Co., 84 Fed. Rep. 392.) Receiver's right to appeal. (Bosworth v. Terminal R. R. Assn., 53 U. S. App. 302; 80 Fed. Rep. 969.) The filing of a petition by a national bank receiver in a Federal court does not operate to make him an officer of that court or to place the assets of the bank within the control of the court. (Ex parte Chetwood, 165 U. S. 443.)

§ 230 a. **Persons disqualified for receivers.**—That no marshal or deputy marshal, attorney or assistant attorney of any district, jury commissioner, clerk of marshal, no bailiff, crier, juror, janitor of any government building, nor any civil or military employee of the government, except as in this act provided (clerk or deputy clerk of court with consent of attorney general) and no clerk or employee of any United States justice or judge shall have, hold or exercise the duties of the United States commissioner. And it shall not be lawful to appoint any of the officers named in this section receiver or receivers in any case or cases now pending or that may be hereafter brought in the courts of the United States. (29 U. S. Stats. 184.)

§ 231. **That every receiver may be sued without previous leave of court.**—Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice. (25 U. S. Stats. 433, sec. 3.)

Suits against receivers.—Under section 3 of the act of March 3, 1887, a judgment rendered in an action in a State court against a receiver appointed in an action in a Federal circuit court instituted prior to

the passage of the act, and which suit in the State court had been brought without the consent of the court appointing such receiver, was not conclusive as against him. but was subject to the equity jurisdiction of the court appointing him. (Missouri Pac. R. Co. v. Texas Pac. R. Co., 41 Fed. Rep. 311.) The statute permitting suits against a receiver without leave of court does not apply to a suit by a stockholder of the corporation against the receiver and others upon a cause of action which accrued to the corporation before the receiver was appointed. (Swope v. Villard, 61 Fed. Rep. 417.) Garnishment proceedings are not suits against a receiver for "any act or transaction of his" within the meaning of this section. (Central Trust Co. v. Chattanooga R. & C. R. Co., 68 Fed. Rep. 685.) A suit against a receiver appointed by a Federal court, brought without leave, is removable since it involves the construction of the provisions of the amendatory act of March 3, 1887, permitting a suit in a State court against a receiver appointed by a Federal court. (Evans v. Dillingham, 43 Fed. Rep. 177.) A suit to recover property acquired by the removing defendant as receiver of a national bank by authority of the laws of the United States arises under the laws of the United States within the meaning of the Removal Act of August 13, 1888. (Sowles v. Witters, 43 Fed. Rep. 700.) An action between a receiver of an insolvent national bank and a depositor, involving only the right of set-off of deposits against notes due by the depositor, does not present a Federal question under Revised Statutes, sec. 5342. (Tehan v. First Nat. Bank, 39 Fed. Rep. 577.) Where receivers of a railroad running through Arkansas, who were appointed in that State, had removed into another State, *held*, that the court would authorize them to be sued in the State courts of Arkansas by service on their station agents

or clerks therein. (Central Trust Co. of N. Y. v. St. Louis A. & T. R. Co., 40 Fed. Rep. 426.) The permission by statute to sue a Federal receiver extends to any court of competent jurisdiction not merely by Federal court. (Central Trust Co. v. East Tennessee V. & G. Ry. Co., 59 Fed. Rep. 523; Texas & Pac. R. R. Co. v. Johnson, 151 U. S. 81.) Where property is in the hands of a receiver appointed by a court, an independent suit to foreclose a mortgage cannot be maintained, even in the same court. (American Loan & T. Co. v. Central Vermont R. Co., 86 Fed. Rep. 390.) When the jurisdiction of the court in which the receiver is sued is conferred by Federal laws, and when such jurisdiction is exclusive, consent of the appointing court is not necessary in order to sue the receiver. (Hupfeld v. Automaton Piano Co., 66 Fed. Rep. 788.) A receiver of a State court cannot be sued without the consent of the appointing court. (Porter v. Sabin, 149 U. S. 473.) The right of a receiver to be sued in a certain district is a personal privilege which may be waived by an appearance and answer. (Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593.) The statute allowing receivers of Federal courts to be sued without leave applies to a receiver appointed by a Territorial court for a corporation created by act of Congress. (Wheeler v. Smith, 81 Fed. Rep. 319.) A receiver may not be sued without leave of the court appointing him for alleged wrongful acts committed in the operation of the road before he became the receiver. (Jones v. Schlapback, 81 Fed. Rep. 274.) The right to sue a receiver without leave of court does not extend to a suit to establish a right to the property placed in his custody adverse to his right thereto. (J. I. Case Plow Works v. Finks, 81 Fed. Rep. 529.) A judgment rendered in a State court against a Federal receiver is conclusive as to the existence and amount of plaintiff's

claim, but the time and manner of payment are to be controlled by the appointing court. (Dillingham v. Hawk, 23 U. S. App. 273; 60 Fed. Rep. 494.)

§ 232. **Issue of search warrants in certain cases.**—The several judges of courts established under the laws of the United States and the commissioners of such courts may, upon proper oath or affirmation, within their respective jurisdictions, issue a search-warrant authorizing any marshal of the United States, or any other person specially mentioned in such warrant, to enter any house, store, building, boat or other place named in such warrant, in the day-time only, in which there shall appear probable cause for believing that the manufacture of counterfeit money, or the concealment of counterfeit money, or the manufacture or concealment of counterfeit obligations or coins of the United States or of any foreign government, or the manufacture or concealment of dies, hubs, molds, plates, or other things fitted or intended to be used for the manufacture of counterfeit money, coins or obligations of the United States or of any foreign government, or of any bank doing business under the authority of the United States or of any State or Territory thereof, or of any bank doing business under the authority of any foreign government or of any political division of any foreign government, is being carried on or practiced, and there search for any such counterfeit money, coins, dies, hubs, molds, plates, and other things, and for any such obligations, and if any such be found, to seize and secure the same,

and to make return thereof to the proper authority; and all such counterfeit money, coins, dies, hubs, molds, plates, and other things, and all such counterfeit obligations so seized, shall be forfeited to the United States. [Approved February 10, 1891.] (26 U. S. Stats. 743.)

§ 233. **Warrant to search to custom officers.**—If any collector, naval officer, surveyor, or other person specially appointed by either of them, or inspector, shall have cause to suspect a concealment of any merchandise in any particular dwelling-house, store, building, or other place, they, or either of them, upon proper application on oath to any justice of the peace, shall be entitled to a warrant to enter such house, store, or other place, in the day-time only, and there to search for such merchandise, and if any shall be found to seize and secure the same for trial; and all such merchandise, on which the duties shall not have been paid or secured to be paid, shall be forfeited. (Rev. Stats. sec. 3066.)

§ 234. **Warrant may issue to internal revenue officer.**—The several judges of the circuit and district courts of the United States and commissioners of the circuit courts may, within their respective jurisdictions, issue a search-warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being

committed upon or by the use of the said premises. (Rev. Stats. sec. 3462.)

§235. (716). **Power to issue writs.**—The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (Rev. Stats. sec. 716.)

Writ of certiorari.—Russell v. Thomas, 31 Leg. Int. 189; Ex parte Van Orden, 3 Blatchf. 166; Fed. Cas. No. 16870; Patterson v. U. S., 2 Wheat. 221; Ex parte Martin, 5 Blatchf. 303; Fed. Cas. No. 9151; Ex parte Stupp, 12 Blatchf. 501; Fed. Cas. No. 13563; Ex parte Bollman, 4 Cranch, 75; Ex parte Buford, 3 Cranch, 447; U. S. v. Young, 94 U. S. 258; Ex parte Vallandigham, 1 Wall. 243; U. S. v. Adams, 9 Wall. 661.

Scire facias.—Oral evidence on scire facias. (Hunt v. United States, 19 U. S. App. 683; 61 Fed. Rep. 795.)

Capias ad satisfaciendum.—Right not limited by State statute. (United States v. Arnold, 34 U. S. App. 177; 69 Fed. Rep. 987.)

Writ of mandamus.—Wheeling v. Mayor, 1 Hughes, 90; Graham v. Norton, 15 Wall. 427; U. S. v. New Orleans, 98 U. S. 381; Riggs v. Johnson, 6 Wall. 166; Ex parte Holman, 28 Iowa, 88; Supervisors v. U. S., 4 Wall. 435; Galena v. Amy, 24 How. 376; Com. v. Sellew, 99 U. S. 624; Smith v. Allyn, 1 Paine, 453; Fed. Cas. No. 13000; The New England, 3 Sum. 495; Fed. Cas. No. 10151; Ex parte Hoyt, 13 Peters, 279; The Enterprise, 3 Wall. Jr. 58; Fed. Cas. No. 4500.) To State courts. (Ladd v. Tudor, 3 Wood &

M. 325; Fed. Cas. No. 7975; Fisk v. Union Pac. R. R. Co., 6 Blatchf. 362; Fed. Cas. No. 4827; Hough v. West. Trans. Co., 1 Biss. 425; Fed. Cas. No. 6724; Rosenbaum v. Bauer, 120 U. S. 450; Labette County v. United States, 112 U. S. 217; In re Sherman, 124 U. S. 364; United States v. Seaboard Ry. Co. of Alabama, 85 Fed. Rep. 955; Deuel Co. v. First Nat. Bank, U. S. App.; 86 Fed. Rep. 264; 74 Fed. Rep. 373.)

Writ of execution.—Wayman v. Southard, 10 Wheat. 1; Bank of U. S. v. Halstead, 10 Wheat, 51.

Writ of attachment.—Voss v. Luke, 1 Cranch C. C. 331; Fed. Cas. No. 17014; U. S. v. Williams, 4 Cranch C. C. 372; Fed. Cas. No. 16712; Montgomery v. McDermott, 83 Fed. Rep. 576.

Writ of assistance.—Terrell v. Allison, 21 Wall. 289. It should not issue against one not a party to the suit. (Comer v. Felton, 22 U. S. App. 313; 61 Fed. Rep. 731.)

Writ of inhibition.—Penhallow v. Doane, 3 Dall. 54.

Writ of injunction.—An injunction will not be granted by a United States court to interfere with the possession, control, or disposition of property in the hands of the State court (Hutchinson v. Green, 2 McCrary, 471); so if the sheriff has possession of property under process of the State court he cannot be displaced by process from the Federal court (Watson v. Jones, 13 Wall. 679); nor can a Federal court interfere with property in the hands of a receiver appointed by the State court (Mercantile Trust Co. v. Lamoille Val. R. R. Co., 16 Blatchf. 324; Fed. Cas. No. 9432); nor can a party be restrained from taking possession of property which a judgment of the State court requires to be delivered to him. (Watson

v. Jones, 13 Wall. 679. See Claybrook v. Owensboro, 16 Fed. Rep. 303.) A court of equity may enjoin an act to protect property rights, even though the act sought to be enjoined is also a violation of the criminal law. (Nashville C. & St. L. Ry. Co. v. McConnell, 82 Fed. Rep. 65.) It is not a fatal objection that the use of the writ of injunction for the particular purpose for which it is sought is novel. (Nashville C. & St. L. Ry. Co. v. McConnell, 82 Fed. Rep. 65.)

Writ of subpoena.—A subpoena duces tecum cannot issue to a witness not a party to a suit to compel him to bring before the court patterns for a stove. (In re Shepard, 18 Blatchf. 226; 3 Fed. Rep. 12.)

§ 236. **Mandamus against common carrier.**—The United States courts shall have jurisdiction upon the relation of any person or persons, firm or corporation, to issue a writ or writs of mandamus against a common carrier, commanding such carrier to move and transport traffic, or to furnish cars or other facilities for transportation for the party applying for the writ, under the Act of March 2, 1889, amendatory of an act to regulate commerce, approved February 4, 1887. (25 U. S. Stats. 862, sec. 19.) Circuit courts have jurisdiction to compel common carriers, under the inter-State commerce act, to publish rates of fares and freights. (24 U. S. Stats. 382.)

§ 237 (717). **Writ of ne exeat.**—Writs of *ne exeat* may be granted by any justice of the supreme court in cases where they might be granted by the supreme court; and by any circuit justice or circuit

judge in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States. (Rev. Stats. sec. 717.)

Writ of ne exeat.—The writ cannot be issued unless a party intends to leave the United States. (Lowenstein v. Biernbaum, 8 Week. Notes, 163; Fed. Cas. No. 8461a; see Patterson v. McLaughlin, 1 Cranch C. C. 352; Fed. Cas. No. 10828; Union Mutual Ins. Co. v. Kellogg, 5 Week. Notes, 477; Fed. Cas. No. 14373.) To obtain the writ, the party must swear positively to a debt or to a belief that a certain balance is due him. (Gernon v. Boecaline, 2 Wash. C. C. 130; Fed. Cas. No. 5677.) It must be an equitable debt or pecuniary claim, and be certain, or capable of reduction to certainty. (Graham v. Stucken, 4 Blatchf. 50; Fed. Cas. No. 5677.) So a claim for the return of property is not sufficient. (Graham v. Stucken, 4 Blatchf. 50; Fed. Cas. No. 5677.) A district judge has no power to award the writ. (Gernon v. Boecaline, 2 Wash. C. C. 130; Fed. Cas. No. 5367.) The question of the propriety of issuing a writ of ne exeat cannot be raised by demurrer. (Shainwald v. Lewis, 69 Fed. Rep. 487.)

§ 238 (718). **Temporary restraining orders.**—Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be

granted with or without security, in the discretion of the court or judge. (Rev. Stats. sec. 718.)

Temporary injunctions.—An injunction may be granted on motion without previous notice to the adverse party (Yuengling v. Johnson, 1 Hughes, 607; Fed. Cas. No. 18195); but the court may in its discretion require notice to be given (Irving v. Hughes, 7 Am. Law Reg., N. S., 209; Fed. Cas. No. 7076; In re Wallace, 1 Deady, 433; Fed. Cas. No. 17094; In re Muller, 1 Deady, 513; Fed. Cas. No. 9912; In re Carlton, 1 Deady, 292; Fed. Cas. No. 4769; In re Smith, 1 N. Y. Leg. Obs. 231; Fed. Cas. No. 3254); and what is reasonable notice depends on the circumstances of the case. (New York v. Connecticut, 4 Dall. 1.) It should not be granted without notice, whether granted by the court or a judge thereof. (New York v. Connecticut, 4 Dall. 1; Wynn v. Wilson, Hemp. 698; Fed. Cas. No. 18116; Lawrence v. Bowman, 1 McAll. 419; Fed. Cas. No. 8134; Perry v. Parker, 1 Wood & M. 280; Fed. Cas. No. 11010.) If a party voluntarily appears, it will be presumed that he had regular and timely notice. (Marsh v. Bennett, 5 McLean, 117; Fed. Cas. No. 9110; Bradley v. Reed, 12 Pittsb. L. J. 65; Fed. Cas. No. 1785.) Interlocutory injunctions may be granted to restrain the mining of ores pending an action at law. (St. Louis M. & M. Co. v. Montana M. Co., 58 Fed. Rep. 129.) The burden of proof is on defendant to show cause for dissolving a temporary injunction (Edison El. Light Co. v. Buckeye El. Co., 59 Fed. Rep. 691); a motion to dissolve should always, when practicable, be addressed to the judge who granted it, and in case of his death two judges should hear the motion to dissolve (Westerly W. Co. v. Westerly, 77 Fed. Rep. 783.) A preliminary injunction merely preserves matters in statu quo, and cannot direct the restoration of prop-

erty to its condition before being disturbed (Southern Pac. Ry. Co. v. City of Oakland, 58 Fed. Rep. 50.) A temporary injunction should not be granted in a case of new impression if it would be possible to effectuate justice in any other way (Ladd v. Oxnard, 75 Fed. Rep. 703.) It should not be granted except in clear cases of pressing necessity (American Cereal Co. v. Eli Pettijohn C. Co., 46 U. S. App. 188; 76 Fed. Rep. 372; Home Ins. Co. v. Nobles, 63 Fed. Rep. 642.) A temporary injunction will not be granted on a bill clearly demurrable (Ladd v. Oxnard, 75 Fed. Rep. 703.) On application for preliminary injunction where grave questions are involved, the court should not decide the merits of the controversy; probable right and danger to that right should be sufficient (New Memphis Gas & L. Co. v. City of Memphis, 72 Fed. Rep. 952; City of Newton v. Lewis, 49 U. S. App. 266; 79 Fed. Rep. 715.) A mere temporary restraining order granted ex parte may be dissolved on motion before answer filed, even where the bill is one for discovery (Fenwick Hall Co. v. Town of Old Saybrook, 66 Fed. Rep. 389.) Public inconvenience is not to be considered where a refusal of the order would work serious injury to plaintiff (Westinghouse Air Brake Co. v. Burton Stock Car Co., 70 Fed. Rep. 619.) Whenever it is manifest that, on the case made, an injunction will be granted on final hearing, one should be granted preliminarily in the absence of special facts (Allington & C. Mfg. Co. v. Booth, 45 U. S. App. 627; 78 Fed. Rep. 878.)

§ **239** (719). **Injunctions.**—Writs of injunction may be granted by any justice of the supreme court in cases where they might be granted by the supreme court; and by any judge of a circuit court

in cases where they might be granted by such court. But no justice of the supreme court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge as one of the judges of the circuit court, in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court. (Rev. Stats. sec. 719.)

Justice of supreme court.—A justice of the supreme court may hear an application outside the circuit when from any cause the parties cannot present it to the circuit or district judge (Searles v. Jacksonville, P. & M. R. R. Co., 2 Woods, 621; Fed. Cas. No. 12586), or in case of absence or sickness of the circuit and district judges (Searles v. Jacksonville, P. & M. R. R. Co., 2 Woods, 621; Fed. Cas. No. 12586); and if the allotted justice and the circuit and district judges are absent from the district and circuit, the writ may be allowed by a justice allotted to another circuit. (United States v. L. & P. Can. Co., 4 Dill. 601; Fed. Cas. No. 15633.)

Circuit judge.—A circuit judge cannot issue the writ at a distance from the clerk's office when the court is in session. (Goodyear Dental V. Co. v. Folsom, 3 Fed. Rep. 509.)

District judge.—The district judge, when holding the circuit court, may issue the writ (Goodyear Dental V. Co. v. Folsom, 3 Fed. Rep. 509); but he cannot issue it beyond his jurisdiction further than to the next term of the circuit court (In re Dudley, 1 Penn. L. J. 302; Fed. Cas. No. 4114), when it ceases to be in force unless an order is made for its continuance. (Parker v. Judges, 12 Wheat. 561; Gray v. Chicago, Iowa & N. R. R. Co., 1 Woodw. 63; Fed. Cas. No. 5713); but if the circuit court refuses to dissolve it, it may be treated as an order for its continuance. (Parker v. Judges, 12 Wheat. 561.) A district judge cannot sign a writ of injunction in vacation, when the circuit court can be applied to. (Goodyear Dental V. Co. v. Folsom, 3 Fed. Rep. 509.)

§ 240 (720). **Injunction to stay proceedings in State courts.**—The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. [See sec. 5106.] (Rev. Stats. sec. 720.)

In general.—This section must be construed in connection with section 716. (Sharon v. Terry, 1 L. R. A. 572.) The prohibition in this section against injunctions by Federal courts to stay proceedings in a State court except in bankruptcy cases, is not in any part repealed or abrogated by U. S. Rev. Stats., sec. 1979, which was a part of the Civil Rights Bill of 1871. (Hemsley v. Myers, 45 Fed. Rep. 283.)

Restraining proceedings in State courts.—This section applies to the restraint of suits, which, but for the injunction, the State court would have jurisdiction over (In re Long Island etc. Trans. Co., 5

Fed. Rep. 628), and only such as are commenced in a State court before proceedings in the Federal court have been commenced (Fisk v. Union Pac. R. Co., 10 Blatchf. 518; Fed. Cas. No. 4830); for if a suit be commenced in the Federal court, subsequent proceedings in a State court may be restrained. (Fisk v. Union Pac. R. Co., 10 Blatchf. 518; Fed. Cas. No. 4830; Lanning v. Osborne, 79 Fed. Rep. 657; President of Bowdoin College v. Merritt, 59 Fed. Rep. 6; In re Whitelaw, 71 Fed. Rep. 733.) It is now thoroughly settled that the statute forbidding the Federal courts to enjoin proceedings in a State court does not apply to proceedings incidental to jurisdiction properly acquired by a Federal court for other purposes than that of enjoining proceedings in a State court (Garner v. Second Nat. Bank, 33 U. S. App. 91; 67 Fed. Rep. 833; Central Trust Co. v. St. Louis A. & T. Ry. Co., 59 Fed. Rep. 385; Terre Haute & G. R. Co. v. Peoria etc. R. R. Co., 82 Fed. Rep. 943.) "Proceedings" include all steps taken in a suit from its inception to final process. (United States v. Collins, 4 Blatchf. 142; Fed. Cas. No. 14834.) This section is an inhibition against staying a party in the conduct of the proceedings in a State court as much as an inhibition against an injunction, mandamus, or prohibition directed to the State court (Fisk v. Union Pac. R. Co., 6 Blatchf. 362; Fed. Cas. No. 4827); and its interpretation is restricted by sections six hundred and forty and six hundred and forty-six of the Revised Statutes to cases where the jurisdiction of the courts of the United States is originally invoked for the purpose of staying proceedings in the State courts. (Perry v. Sharpe, 8 Fed. Rep. 24.) This section of the United States Revised Statutes prohibits Federal courts from issuing injunctions to stay proceedings in State courts, except in matters of bankruptcy. And where lands were sold by order of the

bankruptcy court, the sale confirmed, and the conveyance made by the assignee, the Federal court was held to be without power to enjoin a sale of the same land under an order of the State court. (Sargent v. Helton, 115 U. S. 348; New York & N. E. R. Co. v. Woodruff, 42 Fed. Rep. 468; Tuchman v. Welch, 42 Fed. Rep. 548; Carpenter v. Talbot, 33 Fed. Rep. 537; Chapman v. Brewer, 114 U. S. 158; Hamilton v. Walsh, 23 Fed. Rep. 420; Hunt v. Fisher, 29 Fed. Rep. 801; Yick Wo v. Crowley, 26 Fed. Rep. 207; Lauderdale Co. v. Foster, 23 Fed. Rep. 516; McWhirter v. Halsted, 24 Fed. Rep. 828; Ex parte Schulenburg, 25 Fed. Rep. 211; Weil v. Calhoun, 25 Fed. Rep. 865; Wagner v. Drake, 31 Fed. Rep. 851; Suess v. Noble, 31 Fed. Rep. 855; see, also, French v. Hay, 22 Wall. 250; Dietzsch v. Huidekoper, 103 U. S. 494.) An entry upon lands by petitioner pending condemnation proceedings in a State court will not be enjoined by a Federal court. (Dillon v. Kansas City S. B. R. Co., 43 Fed. Rep. 109.) A Federal court is not prohibited by Rev. Stats., sec. 720, from issuing an injunction to restrain the prosecution in a State court of a multiplicity of threatened suits which have not been actually begun (Texas & Pac. Ry. Co. v. Kuteman, 13 U. S. App. 99; 54 Fed. Rep. 547.) The prohibition of injunctions against the State courts extends to all cases over which such courts first get jurisdiction and applies to the officers and parties in the courts as well as the courts themselves (Whitney v. Wilder, 13 U. S. App. 180; 54 Fed. Rep. 554.)

A court of the United States cannot enjoin proceedings in a State court. (Diggs v. Wolcott, 4 Cranch, 179; Rogers v. City of Cincinnati, 5 McLean, 337; Fed. Cas. No. 12008.) So the supreme court cannot enjoin proceedings in a subordinate

State court, although it has allowed a writ of error to the judgment of the appellate court. (The Slaughter-house Cases, 10 Wall. 273.) The circuit court has no jurisdiction over the proceedings of a State court. (Bridges v. Sheldon, 18 Blatchf. 517; 7 Fed. Rep. 45; Watson v. Jones, 13 Wall. 679.) The statute applies to a case in which it is sought to enjoin a town from levying upon and selling property for the purpose of collecting an assessment of benefits for the laying out of a highway, which assessment the State court has ordered collected (Fanwick Hall Co. v. Town of Old Saybrook, 66 Fed. Rep. 389.) Although the circuit court has no jurisdiction over the proceedings in a State court, yet this section does not prevent it from releasing a defendant from process out of a State court violating its protection, or to prevent abuse of its privileges. (Bridges v. Sheldon, 18 Blatchf. 517; S. C. 7 Fed. Rep. 45; Hurst's Case, 4 Dall. 387.) So a circuit court may restrain parties from taking out criminal process under a State law which impairs the obligations of contract (Louisiana State Lottery Co. v. Fitzpatrick, 3 Woods, 222; Fed. Cas. No. 8541); nor does the section prohibit the district court, after a transfer of the ship and freight under the "Limited Liability Act," from restraining the prosecution of any suit growing out of the disaster theretofore commenced and then pending in a State court. (In re Long Island etc. Trans. Co., 5 Fed. Rep. 627.) A circuit court cannot issue an injunction to stay proceedings in a State court. (The Slaughter-house Cases, 1 Woods, 21; Fed. Cas. No. 12938.) An injunction to restrain suits in the State court for the collection of taxes will not be granted (Moore v. Holliday, 4 Dill. 52; Fed. Cas. No. 9765); but under special circumstances a temporary injunction to restrain the collection of retrospective taxes was allowed. (Moore v. Holliday, 4

Dill. 52; Fed. Cas. No. 9765.) Although a party files a bill of interpleader, yet he cannot restrain a defendant from prosecuting an action pending in the State court. (City Bank v. Skelton, 2 Blatchf. 14; Fed. Cas. No. 2739.) Where the jurisdiction of a court and the right of a plaintiff to prosecute his suit have once attached that right cannot be arrested or taken away by proceedings in another court. (Peck v. Jenness, 7 How. 625.) So, if a marshal is sued in a State court for taking the goods of a third person on a writ of execution, the proceedings against him cannot be enjoined. (Evans v. Pack, 2 Flip. 267; Fed. Cas. No. 4566.) This section prohibits the issue of an injunction to restrain the sale of property under an execution issued out of a State court, although application is made by a third party whose property is taken. (Watson v. Bondurant, 2 Woods, 166; Fed. Cas. No. 17278; S. C. 30 La. An. 1; Daly v. The Sheriff, 1 Woods, 175; Fed. Cas. No. 3553; Perry v. Sharpe, 8 Fed. Rep. 23; contra, Cropper v. Coburn, 2 Curt. 465; Fed. Cas. No. 3416.) The Federal court will not, at the instance of a receiver of a State court, enjoin creditors who have attached property in a State court from prosecuting their suit (Hale v. Bugg, 82 Fed. Rep. 33.) The holder of a chattel mortgage cannot enjoin the sheriff from selling the property under execution on a judgment against the mortgagor. (Ruggles v. Simonton, 3 Biss. 325; Fed. Cas. No. 12120.) The prohibition extends to injunctions against proceedings to enforce a judgment obtained by a party in a State court (Louisville T. Co. v. City of Cincinnati, 73 Fed. Rep. 716.) Courts of the United States have jurisdiction over executors and administrators where the parties have the requisite citizenship, and this jurisdiction is not barred by subsequent proceedings in insolvency in the State court. In such case the courts

may interpose in favor of a foreign creditor to arrest the distribution of any surplus of the estate of decedent. (Green v. Creighton, 23 How. 90; see Youley v. Lavender, 21 Wall. 276; January v. Powell, 29 Mo. 241.) The circuit court cannot issue an injunction to prevent a police officer of a city from serving warrants of arrest issued by a State court for violation of city ordinances, claimed to be in contravention of the fourteenth amendment of the United States Constitution and the treaty with China. (Yick Wo v. Crowley, 26 Fed. Rep. 207.) Between courts of concurrent jurisdiction the court first acquiring jurisdiction will not be interfered with by another court. (Davis v. Life Assn., 11 Fed. Rep. 781; Ward v. Todd, 103 U. S. 327.) Injunction will be refused by the Federal court where a valid judgment has been obtained in a State court against a national bank and the lien thereof has attached before the appointment of a receiver (Baker v. Ault, 78 Fed. Rep. 394.) The application of the statute is not affected by the fact that the land, a sale of which is sought to be restrained is the property of the person asking the injunction (Southern Bank & T. Co. v. Folsom, 43 U. S. App. 713; 75 Fed. Rep. 929.) Injunctions to stay proceedings in State courts were refused in the following cases (Central Trust Co. v. Grantham, 83 Fed. Rep. 540; Reinach v. Atlantic & G. W. Ry. Co., 58 Fed. Rep. 33; Chicago Trust & Sav. Bank v. Bentz, 59 Fed. Rep. 645; Gates v. Bucki, 12 U. S. App. 69; 53 Fed. Rep. 961; American Assn. v. Hurst, 16 U. S. App. 325; 59 Fed Rep. 1; Moloney v. Massachusetts Ben. Assn., 53 Fed. Rep. 209.) What constitutes a violation of an injunction against litigation in a State court, see Stateler v. California Nat. Bank, 77 Fed. Rep. 43.

On cause removed.—A circuit court will not order a stay of all proceedings in a State court in a cause removed into the circuit court (Fisk v. Union Pac. R. Co., 6 Blatchf. 362; Fed. Cas. No. 4827; Perry v. Sharpe, 8 Fed. Rep. 23); but after removal it has jurisdiction to continue in force an injunction allowed by the State court before the removal. (Smith v. Schwed, 6 Fed. Rep. 458; and see Rev. State. secs. 640, 646; Act of March 3, 1875, sec. 4; 18 Rev. Stats., sec. 571.) If plaintiff, after removal, brings an action in a State court upon a judgment rendered therein before removal, defendant may file a bill in the circuit court to restrain the proceedings. (French v. Hay, 22 Wall. 250.) Where a State court improperly refuses a petition for removal, and renders final judgment in a replevin suit, and orders plaintiffs to restore the property, and on their refusal to do so defendant sues on the replevin bond, the Federal court may restrain the proceedings on such suit, the injunction being merely an ancillary proceeding, and not forbidden by this section. (Kern v. Huidekoper, 103 U. S. 485.)

§ 241 (721). **Laws of the States, rules of decision.**—The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply. (Rev. Stats. sec. 721.)

State laws as rules of decision in Federal courts.—As to questions not involving the U. S. Constitution or laws, or affecting the commercial intercourse or business of the country at large, but relating solely to a subject matter within State control, the Federal courts should follow the rules adopted by the State

courts (Kowalski v. Chicago G. W. Ry. Co., 84 Fed. Rep. 586; Illinois Trust & Sav. Bank v. City of Arkansas, 40 U. S. App. 257; 76 Fed. Rep. 272; Forsyth v. Hammond, 166 U. S. 506). When a Federal court construes a State statute with reference to a new question and the State court subsequently interprets it differently the Federal court should thereafter conform to such interpretation (Leighton v. Young, 10 U. S. App. 298; 52 Fed. Rep. 439; Sandford v. Poe, 37 U. S. App. 378; 69 Fed. Rep. 546; Bauserman v. Blunt, 147 U. S. 647; but see In re Copenhaver, 54 Fed. Rep. 660; Chisholm v. Caines, 67 Fed. Rep. 285). Federal courts are not bound by the construction of a State statute by the courts of the State, as applied to contracts entered into before such construction was adopted (Caesar v. Capell, 83 Fed. Rep. 403; Central Trust Co. v. Citizens' St. Ry. Co., 82 Fed. Rep. 1; Bartholomew v. City of Austin, U. S. App. 85 Fed. Rep. 359; Jones v. Great Southern Fireproof Co., U. S. App. 84 Fed. Rep. 370; Louisville Trust Co. v. City of Cincinnati, 47 U. S. App. 36; 76 Fed. Rep. 296; Knox County v. Ninth Nat. Bank, 147 U. S. 91). If a controversy in a Federal court involves a Federal question the court must decide it for itself, treating the State decision with consideration (Central Trust Co. of N. Y. v. Citizens' St. Ry. Co., 82 Fed. Rep. 1; The J. E. Rumbell, 148 U. S. 41; Scott v. McNeal, 154 U. S. 34; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; Id., 68 Fed. Rep. 949). The construction of a State constitution by a State court is binding on the Federal courts where no question affecting the Constitution of the U. S. is involved (McCain v. City of DesMoines, 84 Fed. Rep. 726; Hoge v. Magnes, 56 U. S. App. 500; 85 Fed. Rep. 355; Wade v. Travis County, U. S. App. 81 Fed. Rep. 742; Folsom v. Township of Ninety Six, 59 Fed. Rep. 67; but see Quaker City Nat. Bank v. Nolan County, 59 Fed. Rep. 660). Mere dicta

of a State court concerning the construction of a State statute are not binding (Matz v. Chicago & A. R. Co., 85 Fed. Rep. 180); but are entitled to weight (Nat. Bank v. Whitman, 76 Fed. Rep. 697). A decision by a State court as to whether a statute of the State has been duly enacted is binding on the courts of the United States (Crowther v. Fidelity Ins. T. & S. D. Co., U. S. App. 85 Fed. Rep. 41). Decisions of State courts construing its statutes are binding on the Federal courts (Sutherland-Innes Co. v. Village of Evart, U. S. App. 86 Fed. Rep. 597).

The decisions of a State supreme court that the law of another country is opposed to the policy of a State and cannot be enforced there, are not controlling in the Federal courts (Evey v. Mexican Cent. Ry. Co., U. S. App. 81 Fed. Rep. 294). The decisions of an appellate court not the highest tribunal in a State will sometimes be followed by the Federal court (Seccomb v. Wurster, 83 Fed. Rep. 856). The direct ruling of the supreme court of a State upon a particular question involving the construction of a State statute will be followed by the Federal court (Andrews v. National Foundry & Pipe Works, 46 U. S. App. 281; 76 Fed. Rep. 166; Bergman v. Bly, 27 U. S. App. 650; 66 Fed. Rep. 40). The fact that a State decision was rendered in a friendly suit does not impair its authority in the Federal courts (Sandford v. Poe, 37 U. S. App. 378; 69 Fed. Rep. 546; Adams Express Co. v. Ohio State Auditor, 165 U. S. 194). The Federal courts will not follow a decision of a State court made after the case is submitted (Roberts v. Northern Pac. Ry. Co., 158 U. S. 1; but see Western Union Tel. Co. v. Poe, 64 Fed. Rep. 9). When a State court overrules its decision upon the construction of a State statute after rights have grown up under the former statute the Federal courts are not bound to follow the later decision (Wilson v. Ward Lumber Co., 67

Fed. Rep. 674; National Foundry & P. Works v. Oconto Water Co., 68 Fed. Rep. 1006).

This section relates to the nature and principles of evidence, and also to competency of witnesses. (Conn. Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250; Ex parte Fisk, 113 U. S. 713.)

This section, originally section thirty-four of the Judiciary Act (1 Stats. 92), is construed only to include civil cases at common law, and not criminal offenses against the United States. (United States v. Reid, 12 How. 361.) It is limited strictly to local laws (Swift v. Tyson, 16 Peters, 1; Boyce v. Tabb, 18 Wall. 546); that is to say, to the positive statute of the State (Swift v. Tyson, 16 Peters, 1), to private statutes (Williamson v. Berry, 8 How. 495), and does not apply to questions of a general nature (Boyce v. Tabb, 18 Wall. 546; Willis v. Board of Comm'rs, U. S. App. 86 Fed. Rep. 872; Murray v Chicago & N. W. Ry. Co., 62 Fed. Rep. 24; Hartford Fire Ins. Co. v. Chicago M. & St. P. Ry. Co., 36 U. S. App. 152; 70 Fed. Rep. 201; Eells v. St. Louis, K. & N. W. Ry. Co., 52 Fed. Rep. 903; Cairo V. & C. Ry. Co. v. Brevoort, 62 Fed. Rep. 129; Western Union Tel. Co. v. Cook, 15 U. S. App. 445; 61 Fed. Rep. 624; Western Union Tel. Co. v. Wood, 13 U. S. App. 317; 57 Fed. Rep. 471), as to contracts of a commercial nature, the true interpretation of which is sought in the doctrine of commercial jurisprudence. (Swift v. Tyson, 16 Peters, 1; Railroad Co. v. National Bank, 102 U. S. 14; Oates v. National Bank, 100 U. S. 239; Phipps v. Harding, 34 U. S. App. 148; 70 Fed. Rep. 468; Berry v. Lake Erie & W. R. Co., 70 Fed. Rep. 679; Farmers' Nat. Bank v. Sutton Mfg. Co., 6 U. S. App. 312; 52 Fed. Rep. 191). United States courts adopt and follow the decisions of the State courts in questions which concern merely the constitutions (Luther v. Borden, 7 How. 1;

Jefferson Branch Bank v. Skelly, 1 Black, 436) and statutes of the State (Luther v. Borden, 7 How. 1; Morgan v. Curtenius, 20 How. 1; Jefferson Branch Bank v. Skelly, 1 Black, 436), given by the highest State tribunal as part of the law. (Lavin v. Emigrant Indust. Sav. Bank, 1 Fed. Rep. 641; 18 Blatchf. 1; Christy v. Pridgeon, 4 Wall. 196; see Leffingwell v. Warren, 2 Black, 603; Shelby v. Gay, 11 Wheat. 361.) It applies to the construction of a law providing for administration of estates (Lavin v. Emigrant Indust. Sav. Bank, 18 Blatchf. 11; S. C., 1 Fed. Rep. 641), or to the construction of devices creating estates in fee (Van Rensselaer v. Kearney, 11 How. 297; Carroll v. Lessee of Carroll, 16 How. 275); but the mere construction of a will by a State court does not, as the construction of a statute of the State, constitute a rule of decision for the courts of the United States, unless such construction had been so long acquiesced in as to become a rule of property. (Lane v. Vick, 3 How. 464.) It applies to principles establishing title to real property (Suydam v. Williamson, 24 How. 427; Chicago City v. Robbins, 2 Black, 418; Hoge v. Magnes, 56 U. S. App. 500; 85 Fed. Rep. 355; Henry v. Pittsburgh Clay Mfg. Co., 39 U. S. App. 605; 80 Fed. Rep. 485); and the construction by the State supreme court of the State statutes establishing the rule of property. (Green v. Neal, 6 Peters, 291; Ross v. Duval, 13 Peters, 45; Lauriat v. Stratton, 6 Sawy. 339, 11 Fed. Rep. 107; citing Polk's Lessee v. Wendel, 9 Cranch, 98; Jackson v. Chew, 12 Wheat. 162; Nichols v. Levy, 5 Wall. 433; Independent Dist. v. Beard, 83 Fed. Rep. 5; Elder v. McClaskey, 37 U. S. App. 1; 70 Fed. Rep. 529; Rothschild v. Hasbrouck, 72 Fed. Rep. 813; May v. Tenney, 148 U. S. 60; First Nat. Bank v. Glass, 79 Fed. Rep. 706; but see Ryan v. Staples, 40 U. S. App. 427; 76 Fed. Rep. 721.) This rule of decision does not apply on the general princi-

ples of equity not controlled by local law or usage (Neves v. Scott, 13 How. 268; Montejo v. Owen, 14 Blatchf. 326, Fed. Cas. No. 9722), nor to remedies at common law or in equity (Robinson v. Campbell, 3 Wheat. 212); but a nonresident complainant can ask no greater relief than he could were he to resort to the State courts. (Ewing v. St. Louis, 4 Wall. 413.) The rule applies on questions of jurisdiction of inferior courts of the State under State laws (Jeter v. Hewitt, 22 How. 352), as on a question to subject legal and equitable interests in real estate to the claims of creditors (Nichols v. Levy, 5 Wall. 433); but not to the practice of allowing ejectments to be maintained on equitable titles (Sheirburn v. Cordova, 24 How. 423; Fenn v. Holme, 21 How. 481), nor to State laws regulating proceedings on execution and other process in suits at common law (Wayman v. Southard, 10 Wheat. 1; Ross v. Duval, 16 Peters, 45), nor to all rules governing procedure and practice (Brown v. Van Braam, 3 Dall. 344); but it applies to rules of evidence (Haussknecht v. Claypool, 1 Black, 431), and to the statutes of limitations of the State (Leffingwell v. Warren, 2 Black, 599; Sayles v. Oregon Cent. R. Co., 6 Sawy. 31, Fed. Cas. No. 12423; Moores v. Citizens' Nat. Bank, 11 Fed. Rep. 624, note, Percy v. Cockrill, 10 U. S. App. 574; 53 Fed. Rep. 872; Fearing v. Glenn, 38 U. S. App. 424; 73 Fed. Rep. 116), as limitations of actions and exeeutions on judgments (Sayles v. Oregon Cent. R. Co., 6 Sawy. 31, Fed. Cas. No. 12423; Sayles v. Louisville City R. Co., 9 Fed. Rep. 513), except where the laws of the United States otherwise provide, as in patent cases. (Sayles v. Oregon Cent. R. Co., 6 Sawy. 31, Fed. Cas. No. 12423; Leffingwell v. Warren, 2 Black, 599; Johnson v. Roe, 1 Fed. Rep. 695; Ross v. Duval, 13 Peters, 45; Sayles v. Louisville City R. Co., 9 Fed. Rep. 513.) The decision of State courts will be followed as to the construc-

tion of a contract declared by the State court void, on the general principles of public policy, unless the question was whether the legislation impairs the obligation of the contract. (Delmas v. Ins. Co., 14 Wall. 661; see Budge Proprietors v. Hoboken Co., 1 Wall. 116.) It applies to the interpretation of contracts made by the State, as statutes authorizing municipal corporations to subscribe to aid railroads extending beyond the limits of the city or county, and to issue bonds accordingly. (Gelpecke v. Dubuque, 1 Wall. 175), and to the question as to the validity of municipal bonds issued under the State law (Mitchell v. Burlington, 4 Wall. 271); but not to a question of contract made by the State which violates the Constitution of the United States. (Bridge Prop. v. Hoboken Co., 1 Wall. 116; see Delmas v. Ins. Co., 14 Wall. 661.) So it applies to the construction of a State grant, as a ferry franchise. (Conway v. Taylor, 1 Black, 603.) To what extent the Federal courts adopt and follow the decisions of the State courts, determined. (Gage v. Pumpelly, 115 U. S. 454; Carroll County v. Smith, 111 U. S. 556; Norton v. Shelby County, 118 U. S. 425; Gibson v. Lyon, 115 U. S. 439; Louisville etc. R. R. Co. v. Palmes, 109 U. S. 244; Yick Wo v. Hopkins, 118 U. S. 356; Anderson v. Santa Anna, 116 U. S. 356; Buford v. Holley, 28 Fed. Rep. 680; Woodward v. Gould, 28 Fed. Rep. 736; Dodd v. Ghiselin, 27 Fed. Rep. 405; Freund v. Yaegerman, 27 Fed. Rep. 248; Rice v. Frayser, 24 Fed. Rep. 460; Moulton v. Chafee, 22 Fed. Rep. 26; Venner v. Atchison etc. R. R. Co., 28 Fed. Rep. 581; National Foundry & P. Works v. Oconto Water Co., 68 Fed. Rep. 1006; Chisholm v. Caines, 67 Fed. Rep. 285; Wilson v. Neal, 23 Fed. Rep. 129; Raymond v. Parish of Terrebonne, 28 Fed. Rep. 773; Cook County v. Calumet & C. Canal & D. Co., 138 U. S. 635; Lookout Mt. R. Co. v. Houston, 44 Fed. Rep. 449; Heath v. Wal-

lace, 138 U. S. 573.) State laws and decisions govern United States courts, as to title and transfer of real estate by grant or devise. (Claiborne Co. v. Brooks, 111 U. S. 400; see Bucher v. Railroad Co., 125 U. S. 555; St. Louis v. Rutz, 138 U. S. 226; Buford v. Kerr, 86 Fed. Rep. 97.) Where a local law or custom has been established by repeated decisions of the highest courts of a State, it becomes also the law governing the courts of the United States sitting in that State. (Burgess v. Seligman, 107 U. S. 20.) It has been held, however, that rules of property and action in the State are always regarded by the Federal courts; but the Federal courts exercise their own judgment in reference to the doctrines of commercial law and general jurisprudence. (Pleasant Twp. v. Aetna L. Ins. Co., 138 U. S. 67.) A State decision as to the extent and powers of a corporation created under its laws is binding on a Federal court (Sioux City Terminal Ry. etc. v. Trust Co. of North America, 49 U. S. App. 523; 82 Fed. Rep. 124). The State statute of frauds is applicable to a suit in equity brought in a Federal court (Buhl v. Stevens, 84 Fed. Rep. 922; Moses v. National Bank of Lawrence Co., 149 U. S. 298). A State decision as to the effect of its Sunday laws upon contracts is binding (Hill v. Hite, 56 U. S. App. 403; 85 Fed. Rep. 268). A State decision construing common law rules of evidence is not binding (Union Pac. Ry. Co. v. Yates, 49 U. S. App. 241; 79 Fed. Rep. 584). Decisions of a State court to the effect that under the State statutes one out of possession can bring a suit to remove a cloud on title are binding (Harding v. Guice, 42 U. S. App. 411; 80 Fed. Rep. 162), as are decisions construing the registration statutes of the State (Union Pac. Ry. Co. v. Reed, 49 U. S. App. 233; 80 Fed. Rep. 234). The Federal courts recognize no lien at common law in behalf of an attorney, beyond that given by the local

law (Gregory v. Pike, 21 U. S. App. 658; 67 Fed. Rep. 837). The decision of State tribunals as to the right of set off, except as it is enforced in equity is a matter of local legislation (Charnley v. Sibley, 34 U. S. App. 705; 73 Fed. Rep. 980). Where an indictment found in court of a State in which offense is defined by statute, is removed to a Federal court for trial, the latter court must be controlled by the State decisions (State v. Gosnell, 74 Fed. Rep. 734). Decisions of the supreme court of a State construing its attachment laws are rules of decision in the Federal courts (Rice v. Adler, Goldman Commission Co., 36 U. S. App. 266; 71 Fed. Rep. 151).

The rights and liabilities respecting surface water are matters of local law (Walker v. New Mexico & S. P. R. R. Co., 165 U. S. 593). State decisions as to whether or not certain workmen are fellow servants do not bind Federal courts. (Newport News & M. Co. v. Howe, 6 U. S. App. 172; 52 Fed. Rep. 362; contra, Becker v. Baltimore & O. Ry. Co., 57 Fed. Rep. 188.) But decisions relating to compensation for improvements upon land, made in good faith, are rules of property and binding (McClaskey v. Barr, 62 Fed. Rep. 209); as are decisions upon the question of the validity of a chattel mortgage (Wilson v. Perrin, 22 U. S. App. 514; 62 Fed. Rep. 629); and as to the liability of an employer for injuries to his employee (Northern Pac. Ry. Co., v. Hogan, 27 U, S. App. 184; 63 Fed. Rep. 102); and decisions that contributory negligence shall not be a complete bar to a statutory action for negligence (Byrne v. Kansas City F. S. & M. R. Co., 22 U. S. App. 220; 61 Fed. Rep. 605). State decisions interpreting statutes as to the right of counties to make contracts are binding on Federal courts (Thompson v. Searcy County, 12 U. S. App. 618; 57 Fed. Rep. 1030). The decisions of a State court construing a contract are not binding (Hambley

v. Bancroft, 83 Fed. Rep. 444). The meaning of a State statute, declared by the highest court of a State, is conclusive upon the supreme court of the United States (Morley v. Lake Shore etc. Ry. Co., 146 U. S. 162; Miller v. Swan, 150 U. S. 132; Baltimore Traction Co. v. Baltimore Belt Ry. Co., 151 U. S. 137; Marchant v. Pennsylvania R. R. Co., 153 U. S. 380; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; First Nat. Bank v. County of Chehalis, 166 U. S. 440; Wilson v. State of South Carolina, 169 U. S. 586); but not if it is claimed in a direct appeal from the State supreme court that the judgment was against a right claimed under the U. S. Constitution (Scott v. McNeal, 154 U. S. 34). The construction by the State court of a statute is binding upon the supreme court of the U. S. in determining whether the statute conforms to the Constitution of the United States (Missouri Pac. R. R. Co. v. State of Nebraska, 164 U. S. 403; Merchants & M'f'rs Bank v. Penn., 167 U. S. 461). The decision of a State court as to the time when a cause of action accrues in case of fraud or concealment, based not on a construction of the State statute but upon the view taken of the common law, is not binding on Federal courts (Murray v. Chicago & N. W. Ry. Co., 62 Fed. Rep. 24).

Administering remedies prescribed by State statutes.—Rights created by State statute to be pursued in the State courts may be administered in the Federal courts, either at law, in equity or in admiralty (Darragh v. Welton Mfg. Co., 78 Fed. Rep. 7; Chicot County v. Sherwood, 148 U. S. 529; Indianapolis Water Co. v. American Strawboard Co., 53 Fed. Rep. 970; Farmers' Loan & T. Co. v. Toledo A. A. & N. M. Co., 67 Fed. Rep. 73; First Nat. Bank v. Peavey, 69 Fed. Rep. 455; but see The Wm. M. Hoag, 69 Fed. Rep. 742; England v. Russell, 71 Fed. Rep. 818). The

Federal courts adopt the statutes of limitation of the State where the court is sitting (Miles v. Vivian, 51 U. S. App. 194; 79 Fed. Rep. 848; Fearing v. Glenn, 38 U. S. App. 424; 73 Fed. Rep. 116; Cockrill v. Butler, 78 Fed. Rep. 679; Hayden v. Thompson, 36 U. S. App. 361; 71 Fed. Rep. 60; Scheftel v. Hays, 19 U. S. App. 220; 58 Fed. Rep. 457; Metcalf v. City of Watertown, 153 U. S. 671; Balkam v. Woodstock Iron Co., 154 U. S. 177). But State statutes of limitations do not apply where the United States is plaintiff (U. S. v. Belknap, 73 Fed. Rep. 19.) State laws relating to insolvency and assignment for creditors do not control the Federal courts in receivership cases. (London & S. F. Bank v. Willamette Steam M. L. & M. Co., 80 Fed. Rep. 226.) The Federal courts in administering equitable relief are not bound by any restrictions of the local law, but may have the benefit of any enlargement of equitable rights by the State. (Boston & M. R. R. Co. v. Slocum, 77 Fed. Rep. 345; Meyers v. Shields, 61 Fed, Rep. 713; Prentice v. Duluth Storage & F. Co., 19 U. S. App. 100; 58 Fed. Rep. 437.) A State statute allowing a married woman to sue in her own name does not govern the Federal courts in equity suits (Wills v. Pauly, 51 Fed. Rep. 257), nor are the Federal courts governed by a provision in the State laws with reference to the directing of a jury to make special findings. (Dwyer v. St. Louis & S. F. R. Co., 52 Fed. Rep. 87.)

§ 242 (722). **Proceedings, civil and criminal, in vindication of civil rights.**—The jurisdiction in civil and criminal matters conferred on the district and circuit court by the provisions of this title, and of title "Civil Rights," and of title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall

be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (Rev. Stats. sec. 722).

Remedy at law.—If the remedy at law is speedy and adequate, a remedy in equity, created by State statute, cannot be resorted to in the Federal courts, by reason of the provisions of this section, and of article 7 of the Constitutional Amendments, guaranteeing the right of trial by jury. (Whitehead v. Entwhistle, 27 Fed. Rep. 778.) Federal courts will follow the procedure of the State courts regarding objections to the irregularities in the selection of the grand jury. (United States v. Eagan, 30 Fed. Rep. 608.)

Remedies in law and equity not blended.—The blending of remedies is not permissible in the United States courts. All actions which seek to recover specific property, with or without damages, or a money judgment for breach of a simple contract, or damages for injury to person or property, are legal actions, and can be brought in the Federal courts only on their

law side, provisions in the State statutes to the contrary notwithstanding. (Scott v. Neely, 140 U. S. 106; Hipp v. Babin, 60 U. S. 278; Lewis v. Cocks, 23 Wall. 466; Killian v. Ebbinhaus, 110 U. S. 568; Buzard v. Houston, 119 U. S. 347; Thompson v. Railroad Cos., 6 Wall. 134; Robinson v. Campbell, 3 Wheat. 212; Fenn v. Holmes, 21 How. 481; Clapp v. City of Spokane, 53 Fed. Rep. 515; Whitney v. Fairbanks, 54 Fed. Rep. 985; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371; Coit v. Sullivan Kelly Co., 84 Fed. Rep. 724.) And equitable causes can only be brought on the equity side. (Kircher v. Murray, U. S. App.; 54 Fed. Rep. 617.) Where a case of a purely legal nature was brought in the State court in the form of a bill in equity under a local statute, and removed to the Federal court and conducted as an equity suit, upon appeal the case was remanded, with instructions to redocket the case as one at law and to reframe the pleadings accordingly. (McConnell v. Provident Sav. Life Assn., 37 U. S. App. 213; 69 Fed. Rep. 113.)

§ 243 (723). **When suits in equity may be maintained.**—Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. (Rev. Stats. sec. 723.)

Generally.—This section is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. (Boyce v. Grundy, 3 Peters, 210.)

Plain, Adequate and Complete Remedy at Law.—This phrase refers to the common law and not to State statutes. (Dodge v. Woolsey, 18 How. 331; Cropper v. Coburn, 2 Curt. 465; Fed. Cas. No. 3416; Pratt v. Northam, 5 Mason, 95; Fed. Cas.

No. 11376; Gordon v. Hobart, 2 Sum. 401; Fed. Cas. No. 5609; Kimball v. Mobile, 3 Woods, 555; Fed. Cas. No. 7774.) The adequate remedy at law is that which existed when the judiciary act of 1789 was adopted unless subsequently changed by act of Congress. (Missouri K. & T. R. Co. v. Elliot; 56 Fed. Rep. 773.) The object of the provision requiring suits to be brought at law when possible was to insure the preservation of the right to a jury trial. (Grether v. Wright, 43 U. S. App. 470; 75 Fed. Rep. 742; In re Foley, 76 Fed. Rep. 390.) So whenever a court of law is competent to proceed to final judgment and afford a remedy, plain, adequate, and complete, the plaintiff must pursue that remedy. (Wright v. Ellison, 1 Wall. 16; Dade v. Irwin, 2 How. 383; Andrews v. Solomon, Peters C. C. 356; Fed. Cas. No. 378; Magniac v. Thompson, 15 How. 281; Hungerford v. Ligerson, 20 How. 156; Shapley v. Rangeley, 1 Wood. & M. 213; Fed. Cas. No. 12707); and the absence of a plain and adequate remedy is the only test. (Watson v. Southerland, 5 Wall. 74.) The remedy at law in order to exclude equity must be as practical and efficient to the ends of justice as the remedy in equity. (Tyler v. Savage, 143 U. S. 79.) The objection that there is a plain and adequate remedy is jurisdictional and may be enforced by the court of its own motion (Parker v. W. L. C. & W. Co., 1 Black, 545; Baker v. Biddle, Bald. 394; Fed. Cas. No. 764; Post v. Corbin, 5 Bank Reg. 11, Fed. Cas. No. 11299;) it may be waived (see Waite v. O'Neal, 72 Fed. Rep. 348; Levi v. Evans, 18 U. S. App. 293; 57 Fed. Rep. 677; Book v. Justice Mining Co., 58 Fed. Rep. 827; Knight v. Fisher, 58 Fed. Rep. 991); but the remedy must be plain and adequate. (Boyce v. Grundy, 3 Peters 210; Watson v. Southerland, 5 Wall. 74; Morgan v. Beloit, 7 Wall. 613; Oelrichs v. Spain, 15 Wall. 211; Pierpont v. Fowle, 1 Wood & M. 23;

Fed. Cas. No. 11152; Mayer v. Foulkrod, 4 Wash. C. C. 349; Fed. Cas. No. 9341.) So a party is not remitted to a court of law where the remedy is not effectual and complete. (Wylie v. Coxe, 15 How. 415; May v. Le Claire, 11 Wall. 217; Brown v. Pac. M. S. Co., 5 Blatchf. 525; Fed. Cas. No. 2025.) If a plaintiff has an adequate remedy at law by a suit for damages, a suit in equity, though permitted by State laws, should not be entertained by a State court. (Clamp v. City of Spokane, 53 Fed. Rep. 515.) If a right is equitable, or if legal the remedy is only equitable, or both legal and equitable, the suit for its assertion may be equitable (Baker v. Riddle, Bald. 394; Fed. Cas. No. 764); and it is then no objection that the remedy in that particular case might be adequate. (U. S. v. Meyers, 2 Brock. 516; Fed. Cas. No. 15844; Pratt v. Northam, 5 Mason, 95; Fed. Cas. No. 11376). If the remedy at law was partial and would leave the party to renew the contest in a series of suits, he may have relief in equity (Boyce v. Grundy, 3 Peters, 210; Hipp v. Babin, 19 How. 271; Lewis v. Cocks, 23 Wall. 466); so in case of an illegal tax, to prevent a multiplicity of suits. (Union Nat. Bank v. Chicago, 3 Biss. 82; Fed. Cas. No. 14374; Dows v. Chicago, 11 Wall. 108; First Nat. Bank v. Douglas, 3 Dill. 298; Fed. Cas. No. 4809; Union Pac. R. R. Co. v. McShane, 3 Dill. 303; Fed. Cas. No. 14382; Crane v. McCoy, 1 Bond, 422; Fed. Cas. No. 3354; Plummer v. Conn. Mut. L. Ins. Co., 1 Holmes, 267; Fed. Cas. No. 11232; Garrison v. Memphis Ins. Co., 19 How. 312.) The test of jurisdiction in an action at law is whether, on the facts shown, the plaintiff is entitled to any relief which a court of law is competent to give. (Blalock v. Equitable Life Assur. Soc., 41 U. S. App. 761; 75 Fed. Rep. 43.) If a defendant in an action at law has equitable rights which he is entitled to enforce against plaintiff, he

should resort to equity to arrest or stay the action at law. (Owens v. Heidbreder, 41 U. S. App. 736; 78 Fed. Rep. 837.) There is nothing peculiar to infringement suits for damages and profits whereby equity jurisdiction may be maintained, and it must appear that the remedy at law is inadequate. (Woodmanse & Hewitt Mfg. Co. v. Williams, 37 U. S. App. 109; 68 Fed. Rep. 489). If the trial court had jurisdiction of the subject matter of an equity suit, an objection to the jurisdiction on the ground that complainant had a plain, adequate and complete remedy at law comes too late on appeal. (Lone Jack Min. Co. v. Megginson, 47 U. S. App. 452; 82 Fed. Rep. 89).

Remedy at law.—A bill in equity is not the appropriate remedy to enforce a decree in chancery for the payment of money. (Tilford v. Oakley, Hemp. 197.) So a suit at law cannot be enjoined merely because the party has a good defense (Rogers v. Cincinnati, 5 McLean, 337; Fed. Cas. No. 12008); nor will a bill be entertained to recover possession of property taken from the marshal by the sheriff. (Knox v. Smith, 4 How. 298.) So a court of equity cannot decree that an indorser pay a note. (Shields v. Barrow, 17 How. 130.) A party cannot by bill in equity enforce payment of a policy (Graves v. Boston Mar. Ins. Co., 2 Cranch, 215); nor can a party maintain a bill to enforce a liability for falsely recommending another. (Russell v. Clarke, 7 Cranch, 69.) A municipal corporation cannot maintain a bill to cancel a bond issued without authority and in violation of official duty (Grand Chute v. Winegar, 15 Wall. 373); nor can an insurance company maintain a bill to cancel a policy. (Insurance Co. v. Bailey, 13 Wall. 616; Home Ins. Co. v. Stanchfield, 1 Dill. 424; Fed. Cas. No. 6660.) The mere fact that the evidence is voluminous is not a ground for equitable intervention. (Bowen v. Chase, 94 U. S. 812.)

Remedy in equity.—Equity will entertain a bill for an account only where action for account is the proper remedy at law, or where a trustee is a party (Fowle v. Lawrason, 5 Peters, 495; Blakeley v. Biscoe, Hemp. 114); so a bill may be filed to correct a mistake in partnership accounts (Ivinson v. Hutton, 98 U. S. 79), but it cannot draw to itself every transaction in which an account is to be adjusted; it is only in transactions of great complexity or difficulty at law, or some discovery is required, that equity will interpose. (Fowle v. Lawrason, 5 Peters, 495.) A trustee or cestui que trust may file a bill to obtain possession of land subject to the trust (Harrison v. Rowan, 4 Wash. C. C. 202; Fed. Cas. No. 6143); or an assignee in bankruptcy to obtain the value of property transferred by a partner. (Taylor v. Rasch, 5 Bank. Reg. 399; Fed. Cas. No. 13801.) If the United States claims priority of payment out of a trust fund (Hunter v. United States, 5 Peters, 173), or has a claim against a party who has made a deed of trust, it may file a bill in equity against the trustee. (United States v. Myers, 2 Brock. 516; Fed. Cas. No. 15844.) A statute allowing supplementary proceedings does not prevent the filing of a creditor's bill (Putnam v. New Albany, 4 Biss. 365; Fed. Cas. No. 11481); or although a State law allows suit against a debtor of a debtor. (United States v. Howland, 4 Wheat. 108.) An independent suit against a railroad receiver to recover a simple contract debt owing by the receiver is not sustainable in equity. (Nash v. Ingalls, 79 Fed. Rep. 510.) If there is no adequate remedy at law, a stockholder may apply in equity to prevent a corporation from committing a breach of trust or violation of chartered rights (Dodge v. Woolsey, 18 How. 331; Wheeling v. Mayor, 1 Hughes, 90; Fed. Cas. No. 17502); and when a bill is filed to recover stock, an action at law for damages is not the proper remedy.

(Kilgour v. N. O. Gaslight Co., 2 Woods, 144; Fed. Cas. No. 7764.) Where a creditor has a purely legal demand a suit cannot be brought upon it in equity merely because it is against the estate of a deceased person. (Wallser v. Brown, 27 U. S. App. 291; 63 Fed. Rep. 204; but see Johnson v. Culbertson, 79 Fed. Rep. 5.) A feme covert may file a bill to recover money to which she is entitled (Hunt v. Danforth, 2 Curt. 592; Fed. Cas. No. 6887); or a legatee a bill against the executor to recover a legacy (Mayor v. Foulkrod, 4 Wash. C. C. 349; Fed. Cas. No. 9341); or a distributee to recover his share of the estate. (Payne v. Hook, 7 Wall. 425; Pratt v. Northam, 5 Mason, 95; Fed. Cas. No. 11376.) A party in possession of land may file a bill to quiet title (Morton v. Root, 2 Dill. 312; Fed. Cas. No. 9866); but one who has the legal title cannot maintain a bill against parties in possession of the land. (Speigle v. Meredith, 4 Biss. 120; Fed. Cas. No. 13227); and this is so even where a State statute permits such a suit. (Gordan v. Jackson, 72 Fed. Rep. 86; Eiffert v. Craps, 8 U. S. App. 436; 58 Fed. Rep. 470; Frey v. Willoughby, 27 U. S. App. 417; 63 Fed. Rep. 865.) The circuit court will entertain jurisdiction of a bill for relief against a judgment and sale thereunder on the ground of fraud. (Shelton v. Tiffin, 6 How. 163.) A party impeaching a judicial sale for fraud may proceed, although he has a remedy at law (Slater v. Maxwell, 6 Wall. 268; Cocks v. Izard, 7 Wall. 559); or although he can have his right to the property summarily determined in a State court. (Breeden v. Lee, 2 Hughes, 484; Fed. Cas. No. 1828.) A creditor may file a bill to set aside a fraudulent conveyance. (Railroad Co. v. Howard, 7 Wall. 392; Bean v. Smith, 2 Mason, 252; Fed. Cas. No. 1174.) So a bill may be filed to recover money fraudulently appropriated by directors of a corporation. (Gingrat v. Dane, 4 Cliff.

260; Fed. Cas. No. 5455.) If a party is possessed of a full equitable title to lands he may resort to a court of equity to protect himself, although perhaps he might defend in an action at law by asserting title by prescription. (Massenburgh v. Dennison, 30 U. S. App. 612; 71 Fed. Rep. 618.) If a party has been induced by fraudulent representations to purchase land, he may file a bill to rescind a contract (Boyce v. Grundy, 3 Peters, 210; so a bill may be sustained to establish a will fraudulently suppressed if it avoids a multiplicity of suits. (Gaines v. Chew, 2 How. 619.) If the question of fraud has been tried at law it cannot be reviewed in equity without suggestions of equitable circumstances which could not be availed of at law. (Smith v. McIver, 9 Wheat. 532.) A party who holds the bond of a corporation secured by a pledge may file a bill to enforce the pledge. (Valette v. W. V. Canal Co., 4 McLean, 192; Fed. Cas. No. 16820). The distinction between actions at law and suits in equity in the United States courts is not one of form merely, but of vital substance. (Owens v. Heidbreder, 41 U. S. App. 736; 78 Fed. Rep. 837; In re Foley, 76 Fed. Rep. 390.) Mandamus in a State court to enforce the conveyance of real property is not such an adequate remedy at law as to bar the equitable jurisdiction of a Federal court. (Provisional Municipality v. Lehman, 13 U. S. App. 411; 57 Fed. Rep. 323.) Parties cannot by stipulation convert an equitable suit into a legal one. (Land Trust of Indianapolis v. Hoffman, 13 U. S. App. 411; 57 Fed. Rep. 333.) Discovery is not ordinarily an independent ground for equitable intervention, merely because it is prayed for. (Erskine v. Forest Oil Co., 80 Fed. Rep. 253; Everson v. Equitable Life Assur. Co., 68 Fed. Rep. 258; Cecil Nat. Bank v. Thurber, 8 U. S. App. 496; 59 Fed. Rep. 913.) See generally as to Bills of Peace, Scottish Union v. Mohlman Co.,

73 Fed. Rep. 66; creditor's bill, Putney v. Whitmore, 66 Fed. Rep. 385; Tompkins Co. v. Catawba Mills, 82 Fed. Rep. 780; Bacon v. Harris, 62 Fed. Rep. 99; Greenwood A. & W. R. Co. v. Strang, 77 Fed. Rep. 498; Streight v. Junk, 16 U. S. App. 608; 59 Fed. Rep. 321; National Tules Works v. Ballou, 146 U. S. 517; accounting, Hagenbeck v. Hagenbeck Z. Arena Co., 59 Fed. Rep. 14. The proper practice, where the answer to a bill for partition of real estate entirely denies the title set up by plaintiff, is to stay the suit and send plaintiff to a court of law to establish his title. (Brown v. Cranberry Iron & Coal Co., 25 U. S. App. 679; 72 Fed. Rep. 96.)

Equity jurisdiction.—The equity jurisdiction of the courts of the United States is subject to neither limitation nor restraint by the State authorities, and is uniform throughout the different States of the Union. (Gamewell Fire Alarm Tel. Co. v. Mayor etc., Cir. Ct. N. Y., 31 Fed. Rep. 312.) Federal courts may enforce on their equity side new rights or privileges established by State or Territorial statutes. (Cowley v. Northern Pac. Ry. Co., 159 U. S. 569; Gilchrist v. Helena Hot Springs & S. R. R. Co., 58 Fed. Rep. 708.) A court of the United States sitting in equity cannot control a principal surveyor of a military district in the discharge of his official duties, or take charge of the records of his office, or declare their effect to be other than what appears on their face. (Fussell v. Gregg, 113 U. S. 550.) A court of equity has power to issue an injunction to aid the general government to prevent a forcible obstruction of interstate commerce and the transportation of the mails (In re Debs, 158 U. S. 564), and may issue an injunction to prevent a collector of customs from destroying teas, on the ground of preventing a multiplicity of suits. (Sang Lung v. Jackson, 85 Fed. Rep. 503.) The equity jurisdiction of the Federal courts

will not take cognizance of a suit by a colored person, to restrain officers of a State from denying his right to vote under a State statute which he claims is in violation of the amendment to the United States Constitution. (Gowdy v. Green, 69 Fed. Rep. 865.) Courts of equity concern themselves only with matters of property and the maintenance of civil rights and have no jurisdiction in matters of an executive or political nature (Taylor v. Kercheval, 82 Fed. Rep. 497); but sometimes a court of equity will restrain criminal proceedings. (Wadley v. Blount, 65 Fed. Rep. 667.) Equity will not enjoin an action at law on a note and contract tainted with usury. (Atkinson v. Allen, 36 U. S. App. 255; 71 Fed. Rep. 58.) A court of equity has jurisdiction of a suit against the directors of a national bank for excessive loans in certain cases. (Cockrill v. Cooper, U. S. App. 86 Fed. Rep. 7.)

Injunction.—A court of equity will not interfere to stay proceedings in a number of actions of ejectment to abide the result of one (Peters v. Prevost, 1 Paine, 64; Fed. Cas. No. 11032); nor will injunction issue to restrain a threatened trespass until it tends to irreparable mischief (Le Roy v. Wright, 4 Sawy. 530; Fed. Cas. No. 8273; but a denial of title is no reason for refusing to enjoin a trespass, if the trespass goes to the destruction of the estate. (United States v. Parrott, 1 McAll. 271; Fed. Cas. No. 15998; Le Roy v. Wright, 4 Sawy. 530; Fed. Cas. No. 8273; Buskirk v. King, 25 U. S. App. 607; 72 Fed. Rep. 22; Perry v. Parker, 1 Wood & M. 280; Fed. Cas. No. 11010.) An injunction will issue to protect a lien by attachment on property which another person threatens to sell under execution. (New York Com. Co. v. Francis, 83 Fed. Rep. 769.) A court will not enjoin a threatened injury where there is a plain and adequate remedy at law. (Parker v. W. L. C. & W. Co., 2 Black, 545).

If the sheriff attempts to take property from the possession of the marshal under a writ of replevin, he may be restrained to prevent a conflict of jurisdiction (Crane v. McCoy, 1 Bond, 422; Fed. Cas. No. 3354); but a mortgagee of personal property cannot restrain the sale under execution (La Mothe v. Fink, 8 Biss. 493; Fed. Cas. No. 8032); nor a person whose property is taken on execution against another (Van Norden v. Morton, 99 U. S. 378); but if it would destroy the credit or break up the business of the owner, he may restrain the sale. (Watson v. Sutherland, 5 Wall. 74.) Injunction and accounting may both be granted in the same suit in case of trespass on a mining claim. (Consol. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. Rep. 540). Although an injunction is sought to prevent another from acting under an agreement, yet damages for its breach cannot be recovered (La Mothe Mfg. Co. v. Nat. Tube Works, 15 Blatchf. 432; Fed. Cas. No. 8033); but if equity takes jurisdiction it will grant full relief, although the relief would be as full as at law. (Gass v. Stinson, 2 Sum. 453; Fed. Cas. No. 5260; Warner v. Daniels, 1 Wood & M. 90; Fed. Cas. No. 17181; Pierpont v. Fowle, 2 Wood & M. 23; Fed. Cas. No. 11152; Foster v. Swasey, 2 Wood & M. 217; Fed. Cas. No. 4984.) The courts have jurisdiction to enjoin an officer from removing an assistant who claims protection under the civil service law. (Couper v. Smyth, 84 Fed. Rep. 757; Butler v. White, 83 Fed. Rep. 578; Priddie v. Thompson, 82 Fed. Rep. 186; contra, Taylor v. Kercheval, 82 Fed. Rep. 497; Flemming v. Stahl, 83 Fed. Rep. 940.) A court of equity will enjoin the enforcement of a bid for public works, induced by the mistake of one. (Moffett v. City of Rochester, 82 Fed. Rep. 255.) An injunction was granted to restrain ticket scalpers from continuing in business. (Nashville C. & St. L. Ry. Co. v. McConnell, 82 Fed.

Rep. 65.) Inconvenience of the public in stopping the running of electric cars is not sufficient ground to require the refusal of an injunction. (Thomson-Houston El. Co. v. Union Ry. Co., 78 Fed. Rep. 365.) An injunction was granted to restrain defendants from organizing a boycott or strike in the following cases: (Mackall v. Ratchford, 82 Fed. Rep. 41; Hopkins v. Oxley Stave Co., 49 U. S. App. 709; 83 Fed. Rep. 912; Oxley Stave Co. v. Coopers' Int. Union, 72 Fed. Rep. 695; Consolidated Steel & W. Co. v. Murray, 80 Fed. Rep. 811.) A Federal court will enjoin the sale of real estate belonging to a national bank in certain cases. (Brown v. French, 80 Fed. Rep. 166.) An injunction may issue from a Federal court to restrain an army officer from committing a trespass on lands where he justified his proposed action on the ground that he is simply obeying the orders of his superiors (La Chapelle v. Bubb, 69 Fed. Rep. 481); and the writ will issue where a governmental employee has interrupted the usual course of business of his office and threatens to continue such interruption. (Fairfield Floral Co. v. Bradbury, 87 Fed. Rep. 415.) The Federal courts will not enjoin the performance by an executive officer of discretionary acts. (Enterprise Sav. Assn. v. Zumstein, 37 U. S. App. 71; 67 Fed. Rep. 1000; Lane v. Anderson, 67 Fed. Rep. 563.)

§ 244 (724). **Power to order production of books and writings in actions at law.**—In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chan-

cery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default. (Rev. Stats. sec. 724.)

Production of Books or Writings.—Section seven hundred and twenty-four, Revised Statutes, limits the remedy to cases where issue is joined. (Jacques v. Collins, 2 Blatchf. 23; Fed. Cas. No. 7167); United States v. Hutton, 25 Int. Rev. Rec. 37; Fed. Cas. No. 15434.) It does not take away the right to relief by bill of discovery except where the remedy is given. (United States v. Hutton, 10 Ben. 269; Fed. Cas. No. 15433; Bryant v. Layland, 6 Fed. Rep. 127). Its provisions extend to proceedings in rem to enforce a forfeiture (United States v. Barrels, 10 Int. Rev. Rec. 205; but see United States v. Packages, Gilp. 306; Fed. Cas. No. 16561); and to cases in bankruptcy. (In re Mendenhall, 9 Bank Reg. 205; Fed. Cas. No. 9423.) The order can be made only in cases where relief might have been had by bill of discovery (Finch v. Rikeman, 2 Blatchf. 301; Fed. Cas. No. 4788); and that a bill of discovery has been filed is no bar to the motion (Iasigi v. Brown, 1 Curt. 401; Fed. Cas. No. 6993), nor that a copy of the paper has been filed in answer to the bill of discovery (Iasigi v. Brown, 1 Curt. 401; Fed. Cas. No. 6993), unless the discovery has been completely effectual (Iasigi v. Brown, 1 Curt. 401; Fed. Cas. No 6993); but it does not apply in cases where a subpoena duces tecum issues to compel a witness to produce papers. (United States v. Babcock, 3 Dill. 566; Fed. Cas. No. 14484; Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 20; Fed. Cas. No. 9448.) The power given in this section includes power to grant an

inspection before trial with permission to make copies. (Exchange Nat. Bank v. Washita Cattle Co., 61 Fed. Rep. 190; Lucker v. Phoenix Assur. Co., 67 Fed. Rep. 18.) In requiring the production of books or writing in evidence, Federal courts are governed by this section, and not by the provisions of State statutes. (Gregory v. Chicago M. & St. P. R. Co., 10 Fed. Rep. 529.) The formalities of a bill of discovery are not requisite; a mere motion with notice to the opposite party, and a description of the books or papers with sufficient certainty, is sufficient. (Jacques v. Collins, 2 Blatchf. 23; Fed. Cas. No. 7167; and where letters are described by their subject matter it is sufficiently explicit. (Vasse v. Mifflin, 4 Wash. C. C. 519, Fed. Cas. No. 16895.) The applicant must show that the paper exists, that it is in possession of the party, and that it is pertinent to the issue. (Triplett v. Bank of Wash. 3 Cranch C. C. 646; Jacques v. Collins, 2 Blatchf. 23; Fed. Cas. No. 7167; Iasigi v. Brown, 1 Curt. 401; Fed. Cas. No. 6993; Bas v. Steele, 3 Wash. C. C. 381; Fed. Cas. No. 1088.) The complainant in a patent infringement suit cannot require the production of all the books of a large business. (Fuller v. Field, 53 U. S. App. 566; 82 Fed. Rep. 813.) An ex parte affidavit is sufficient (U. S. v. Packages, Gilp. 306, Fed. Cas. No. 16561); a motion is requisite (Thompson v. Selden, 20 How. 194; May v. Carbery, 2 Cranch C. C. 336, Fed. Cas. No. 9339; Bank of United States v. Kurtz, 2 Cranch C. C. 342, Fed. Cas. No. 920; Macomber v. Clarke, 3 Cranch C. C. 347, Fed. Cas. 8918; Bas v. Steele, 3 Wash. C. C. 381, Fed. Cas. No. 1088); and it may be made before the day of trial (Central Bank v. Tayloe, 2 Cranch C. C. 427, Fed. Cas. No. 2548; Iasigi v. Brown, 1 Curt. 401, Fed. Cas. No. 6993); and notice to the party required to produce the books or writings must be given (Maye v. Carbery, 2 Cranch C. C. 336,

Fed. Cas. No. 9339; Thompson v. Selden, 20 How. 195; Bas v. Steele, 3 Wash. C. C. 381; Fed. Cas. No. 1088); and it must contain information that a motion will be made for a non-suit or for judgment by default. (Bas v. Steele, 3 Wash. C. C. 381; Fed. Cas. No. 1088.) It may be given to the party or to his attorney (Geyger v. Geyger, 2 Dall. 332; U. S. v. Barrels, 10 Int. Rev. Rec. 205); and must be reasonable (Macomber v. Clarke, 3 Cranch C. C. 347; Fed. Cas. No. 8918); for an order will not be made at the trial on motion without notice. (Sampson v. Johnson, 2 Cranch C. C. 107; Fed. Cas. No. 12281; Bank of U. S. v. Kurtz, 2 Cranch C. C. 342; Fed. Cas. No. 920). If not reasonable the trial may be postponed to give the party an opportunity to procure the evidence. (Geyger v. Geyger, 2 Dall. 332; Bank of U. S. v. Kurtz, 2 Cranch C. C. 342; Fed. Cas. No. 920.) The power to grant the motion is discretionary, but should be firmly exercised in a proper case. (Merchant's Nat. Bk. v. Stat. Nat. Bk., 3 Cliff. 201; Fed. Cas. No. 9448). The court may at once either refuse the motion or make the rule absolute (Dunham v. Riley, 4 Wash. C. C. 126; Fed. Cas. No. 4155); and where an intent to conceal or destroy the books or papers is shown the order should be made without delay, and absolute; but if there is no suggestion of fraudulent intent, and the evidence as to their pertinency is not satisfactory, the order, if made at all, should be made nisi. (Merchant's Nat. Bk. v. Stat. Nat. Bk., 3 Cliff. 201; Fed. Cas. No. 9448.) The order need not be absolute, but may leave the party to show cause at the trial. (Merchant's Nat. Bank v. State Nat. Bank, 3 Cliff. 201; Fed. Cas. No. 9448; Iasigi v. Brown, 1 Curt. 401; Fed. Cas. No. 6993; Dunham v. Riley, 4 Wash. C. C. 126; Fed. Cas. No. 4155.) Where the motion is made before trial the order must require the production of the books at the trial (Merchant's

Nat. Bank v. State Nat. Bank, 3 Cliff. 201; Fed. Cas. No. 9448; Iasigi v. Brown, 1 Curt. 401; Fed. Cas. No. 6993; but see Central Bank v. Tayloe, 2 Cranch C. C. 427; Fed. Cas. No. 2548); and it may require him to produce them and leave them with the clerk, or furnish copies to the adverse party (Jacques v. Collins, 2 Blatchf. 23; Fed. Cas. No. 7167); but the word "require" does not include the power to compel compliance (Merchant's Nat. Bank v. State Nat. Bank, 3 Cliff. 201; Fed. Cas. 9448); as the penalty for failure to produce a paper is nonsuit or default (Iasigi v. Brown, 1 Curt. 401; Fed. Cas. No. 6993); and a motion for non-pros for failing to produce may be made even after the jury is sworn. (Waller v. Stewart, 4 Cranch C. C. 532; Fed. Cas. No. 17109.) A party cannot be compelled to produce a paper which would subject him to a penalty or a forfeiture. (Finch v. Rikeman, 2 Blatchf. 301; Fed. Cas. No. 4788; U. S. v. Packages, Gilp. 306; Fed. Cas. No. 16561; U. S. v. Nat. Lead Co., 75 Fed. Rep. 94). The order must be served a reasonable time before the production of the paper is required. (Macomber v. Clarke, 3 Cranch C. C. 347; Fed. Cas. No. 8918.) It is premature before the jury are sworn and the trial commenced for either party to call upon the other to produce a paper which he has received notice to produce on the trial. (Hylton v. Brown, 1 Wash. C. C. 298; Fed. Cas. No. 6981.) He has no right to examine them before trial to discover if there is in them anything pertinent to the issue (Triplett v. Bank of Washington, 3 Cranch C. C. 646; Fed. Cas. No. 14178); but the books must be produced at the trial or an excuse given under oath for not producing them (U. S. v. Barrels, 10 Int. Rev. Rec. 205), so he may make an oath that they are not in his possession (U. S. v. Packages, Gilp. 306; Fed. Cas. No. 16561); and such oath may be met by contrary proof. (Bas v. Steele, 3 Wash.

C. C. 381; Fed. Cas. No. 1088.) A petition by a stockholder of an insolvent company to inspect a mine with a view to having the receiver removed is in the nature of a motion made for the production by parties of books or writings in their possession. (Henszey v. Langdon-Henszey Coal M. Co., 80 Fed. Rep. 178). If the omission to produce the books arose from oversight, the case may be postponed to allow time to procure the affidavit of the party. (U. S. v. Barrels, 10 Int. Rev. Rec. 205.) If, by affidavit, he explains how the paper came into his possession, the court may order the affidavit put in evidence with the paper. (Bank of U. S. v. Wilson, 3 Cranch C. C. 213; Fed. Cas. No. 943). If a party inspects a book after its production it may be used as evidence by the adverse party. (Waller v. Stewart, 4 Cranch C. C. 532; Fed. Cas. No. 17109). After removal of a cause from a State Court, the Circuit Court should enforce an order made in the State court for the production of books or papers. (Williams Mower Co. v. Raynor, 7 Biss. 245; Fed. Cas. No. 17748). This section applies as well to cases arising under the revenue laws (U. S. v. Hughes, 12 Blatchf. 553; Fed. Cas. No. 15417; U. S. v. Distillery, 6 Biss. 483; Fed. Cas. No. 14966), as in a proceeding to enforce a forfeiture under these laws. (U. S. v. Mason, 6 Biss. 350; Fed. Cas. No. 15775). There is nothing in this section to prevent Government from seizing and examining the books of a distiller to ascertain some fact that will sustain a charge. (U. S. v. Mason, 6 Biss. 350; Fed. No. 15735). A description is sufficient which calls for the production of books and papers of a certain business between specified dates. (U. S. v. Distillery, 6 Biss. 483; Fed. Cas. No. 14966; U. S. v. Three Tons, 6 Biss. 379; Fed. Cas. No. 16515). Plaintiff is not entitled under this section to an order for the production by a defendant before trial of private books of account for plaintiff's inspection on an affidavit merely stating

that affiant "believes" that such books will tend to prove the issues, without stating any grounds for such belief. (Caspary v. Carter, 84 Fed. Rep. 416.)

§ 245 (725). **Power to impose oaths and punish contempts.**—The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; *provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts. (Rev. Stats. sec. 725.)

Disobedience or resistance to orders, etc -The exercise of the power to punish for the disobedience of an order has a two-fold aspect: first, to punish for disrespect of the court, and second, to compel performance of the duty required; in the first case the court must judge for itself as to the punishment; in the latter the party should be imprisoned till he performs the act required (In re Chiles, 22 Wall. 157.) and the Federal court may commit for contempt, although it has not jurisdiction over the cause. (Williamson's Case, 26 Pa. St. 9.) Where the order is in effect a final judgment for payment of money, the power of the court cannot be enforced (In re Atlantic Mut. Ins. Co., 17 Bank. Reg. 368; Fed. Cas. No. 629; The Blanche Page, 16 Blatchf. 1; Fed. Cas.

No. 1524); and a person who merely interferes with property constructively attached cannot be proceeded against. (Steam Stone Cut Co. v. Windsor Manuf. Co. 3 Fed. Rep. 298.) An interpreter or expert refusing to obey a summons will not be committed except in case of necessity. (In re Roelker, 1 Sprague, 276; Fed. Cas. No. 11995.) The power to summon a witness carries with it the power to enforce obedience; and if he lives within a hundred miles of the court, he may be attached for contempt for refusing to obey the subpoena (Voss v. Luke, 1 Cranch C. C. 331; Fed. Cas. No. 17014; Hodgson v. Butts, 1 Cranch. C. C. 447; Fed. Cas. No. 6563; Somerville v. French, 1 Cranch C. C. 474; Fed. Cas. No. 13173; United States v. Williams, 4 Cranch C. C. 372; Fed. Cas. No. 16712; see Woods v. Young, 1 Cranch C. C. 346; Fed. Cas. No. 17994; Park v. Willis, 1 Cranch C. C. 357; Fed. Cas. No. 10716; Lewis v. Mandeville, 1 Cranch C. C. 360; Fed. Cas. No. 8326; Ex parte Pleasants, 4 Cranch C. C. 314; Fed. Cas. No. 11225; United States v. Jacobi, 4 Am. L. T. 148.) He may be attached for contempt, although he lives out of the district (United States v. Williams, 4 Cranch C. C. 372; Fed. Cas. No. 16712); but sickness of himself or family will be an excuse (Ex parte Beebees, 2 Wall. Jr. 127; Fed. Cas. No. 1220); or in case of great inconvenience. (Ex parte Beebees, 2 Wall. Jr. 127; Fed. Cas. No. 1220.) A restraining order must be obeyed in its entirety until modified; the fact that respondents were acting under advice of counsel may mitigate but will not obviate punishment (Pokegama Sugar Pine L. Co. v. Klamath River L. & I. Co., 86 Fed. Rep. 538; Ulman v. Ritter, 72 Fed. Rep. 1000.) A person may be bound by an injunction though he is not a party to the suit, and though not served with an injunction order (Ex parte Lennon, 22 U. S. App. 561; 54 Fed. Rep. 320.)

Actual notice of an injunction makes it binding upon a party though he is not served. (Ulman v. Ritter, 72 Fed. Rep. 1000.) It is a violation of an injunction against a partnership for the members to do the acts in their capacity as servants of others as well as in their individual capacity (Daderrian v. Gullian, 79 Fed. Rep. 784.) Though a person is not named in an injunction it becomes binding as against him if served on him as one of the unknown defendants (United States v. Agler, 62 Fed. Rep. 824.) Petition and rule for attachment is a proper method to pursue in a proceeding for contempt in disobeying an order of court, although not the only remedy; and when a copy of such petition is served on defendant six days is sufficient time to answer or get an extension of time to answer. (American Const. Co. v. Jacksonville T. & K. W. Ry. Co., 52 Fed. Rep. 937.) Refusal to attend court in obedience to a subpoena is a contempt (Carman v. Emerson, 36 U. S. App. 388; 71 Fed. Rep. 264.)

Contempt.—For a discussion of the nature and classes of contempts, and motive as an element, see (Indianapolis Water Co. v. American Strawboard Co., 75 Fed. Rep. 972.) The power to punish for contempt is incidental and necessary to the exercise of all other powers. (United States v. Hudson, 7 Cranch, 32; United States v. New Bedford Bridge, 1 Wood. & M. 401; Fed. Cas. No. 15867.) A contempt of court is a crime against the United States (United States v. Jacobi, 4 Am. L. T. 148); and if willful may be dealt with by indictment. (United States v. Jacobi, 4 Am. L. T. 148.) This section applies to the circuit and district courts. (Ex parte Robinson, 19 Wall. 506.) The power to commit for contempt is limited to cases where there has been misbehavior in presence of the court, or of any officer of the court in his official transactions, or where

there is a resistance to any lawful writ, process, order, decree, or command of the court. (Ex parte Robinson 19 Wall. 506; Bridges v. Sheldon, 18 Blatchf. 518.) A proceeding for contempt cannot be re-examined on appeal or writ of error. (Hayes v. Fischer, 102 U. S. 121.) This section is a limitation upon the manner in which the power to punish for contempt shall be exercised. (Ex parte Robinson, 19 Wall. 506.) The circuit courts have power to punish for contempt for any disobedience or resistance by any such officer, or by any party, juror, witness; or other person, to any lawful writ, process, order, rule, decree or command of the said courts (R. S. sec. 725; 1 Stat. 83; 4 Stat. 487; In re Terry, 289 U. S. 287.) The right of a citizen of one State to institute proceedings in a United States circuit court situated in another State to punish for contempt citizens of the latter State who have disobeyed a decree of such court in the enforcement of which the petitioner has an interest, is a right secured by the constitution and laws of the United States within the meaning of U. S. Rev. Stats. secs. 5508, 5509, which provides a punishment for conspiring to injure, oppress, threaten, or intimidate a person in the exercise of such rights. (United States v. Lancaster, 10 L. R. A. 317; see Ex parte Yarbrough, 110 U. S. 651; United States v. Lancaster, 44 Fed. Rep. 885, 896.) A sheriff who levies upon property in possession of a Federal court, and continues to detain the property contrary to the order of the court, is guilty of contempt and is liable to punishment therefor (Ex parte Tyler, 149 U. S. 164; Sabin v. Fogarty, 70 Fed. Rep. 482; Ex parte Hudekoper, 55 Fed. Rep. 709); but a sheriff is not guilty of contempt in levying upon goods which have passed out of the custody of the Federal court (Animarium Co. v. Bright, 82 Fed. Rep. 197.) It is a contempt to bring an action at law to

recover the same rents and profits where an interlocutory decree has been rendered for complainant, and the cause remanded to a master for an accounting of rents and profits (Garner v. Second National Bank, 33 U. S. App. 91; 67 Fed. Rep. 833.) A Federal court has no jurisdiction to punish as a contempt an act of disobedience to an order which the court intended to make but which was never entered; or an act in violation of a stipulation in open court. Neither can the court make so punishable an act not forbidden by an order or decree at the time it was committed, by afterward entering a nunc pro tunc order forbidding such act (Ex parte Buskirk, 25 U. S. App. 613; 72 Fed. Rep. 14.) It is a contempt of court to unlawfully impede or prevent a receiver of a railroad from complying with an order of the court in running the road (Thomas v. Cincinnati N. O. & T. P. Ry. Co., 62 Fed. Rep. 803.)

In presence of the court.—It is a contempt of court for a person acquitted of a crime to threaten vengeance on a witness within the possible hearing of the court (United States v. Carter, 3 Cranch C. C. 423; Fed. Cas. No. 14740); or to use abusive language in the courtroom (United States v. Emerson, 4 Cranch C. C. 188; Fed. Cas. No. 15050); or to commit an assault and battery at the entrance to the courtroom (United States v. Emerson, 4 Cranch C. C. 188; Fed. Cas. No. 15050); or for a witness to refuse to be sworn according to law (United States v. Coolidge, 2 Gall. 364; Fed. Cas. No. 14858); or to refuse to answer a question and misbehave before the jury (United States v. Caton, 1 Cranch C. C. 150; Fed. Cas. No. 14758; but it is not a contempt to serve a summons on a suitor while he is in actual or constructive presence of the court. (Blight v. Fisher, Peters C. C. 41; Fed. Cas. No. 1542.) It is contempt

to bribe a person who is a material witness, to hide himself and remain away, thereby preventing his testifying in a case, whether such person has been subpoenaed or not, the act of bribery being a contempt committed "so near," to the court "as to obstruct or impede the due administration of justice" (In re Brule, 71 Fed. Rep. 945.)

Out of presence of court.—If an officer does not obey an order directing him to pay over money received in his official capacity, it is a contempt of court. (In re Pittman, 1 Curt. 186; Fed. Cas. No. 11184; Bagley v. Yates, 3 McLean, 465; Fed. Cas. No. 725.) So where money is collected by a deputy marshal ex officio (The Lawrens, 1 Abb. Adm. 508; Fed. Cas. No. 8122; United States v. Mann, 2 Brock. 9; Fed. Cas. No. 15716; Bagley v. Yates, 3 McLean, 465; Fed. Cas. No. 725); but the marshal is not responsible (Bagley v. Yates, 3 McLean, 465; Fed. Cas. No. 725); and if proceedings are instituted for fees collected by an officer, his claim for fees for services rendered may be set off. (United States v. Mann, 2 Brock. 9; Fed. Cas. No. 15716.) If an attorney collects money for his client and refuses to pay it over, he is liable for contempt (In re Paschal, 10 Wall. 483); but if he has cross-demands, and has not acted dishonestly, he is not liable (In re Paschal, 10 Wall. 483), and courts cannot disbar him for the contempt, but may do so for misconduct. (Ex parte Robinson, 19 Wall. 506.) A person summoned as a juror, expressing an opinion for the purpose of disqualifying himself, is guilty of contempt (United States Devaughan, 3 Cranch C. C. 84; Fed. Cas. No. 14952); or for disobeying orders of court as to conversing with others about the case (In re May, 1 Fed. Rep. 737); or for escaping out of a window of the jury-room. (Offutt v. Parrott, 1 Cranch C. C. 154; Fed. Cas. No. 10453.)

§ 246. **Occupants of lands, remedies for improvements.**—When an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the State or Territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made. [Approved June 1, 1874.] (18 U. S. Stats. 50. See Rev. Stats. sec. 121.)

§ 247 (726). **New Trials.**—All of the said courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. (Rev. Stats. sec. 726.)

Granting of new trials.—This section relates only to cases where there has been a trial by jury; in other cases State laws may give additional remedies. (Clark v. Sohier, 1 Wood. & M. 368; Fed. Cas. No. 2835.) A new trial will not be granted upon the ground of newly discovered evidence, where the party had heard rumors which if followed up would have led to a discovery of the evidence before trial, or where the new evidence would be merely cumulative (Wright v. Southern Ex. Co., 80 Fed. Rep. 85). A verdict in favor of a party whose conduct was calculated to improperly influence the jury upon a material question should be set aside and a new trial granted on the ground of public

policy (Preston v. Mutual Life Ins. Co. of N. Y., 71 Fed. Rep. 467). A circuit court will not grant a new trial because one of the jurors was a nonresident of the district, which fact was not disclosed at the trial (Fisher v. Yoder, 53 Fed. Rep. 565). An application to file a bill of review on the ground of newly discovered evidence will not be granted unless the evidence is so controlling that it would probably induce a different conclusion than that on which the former decree was based (Jourolmon v. Ewing, 85 Fed. Rep. 103). A new trial will usually be granted where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of a judge (Hume v. Bowie, 148 U. S. 245). Refusal to grant a new trial is not reviewable, see ante § 177, p. 661.

§ 248 (727). **Power to hold to security for the peace and good behavior.**—The judges of the supreme court and of the circuit and district courts, the commissioners of the circuit courts, and the judges and other magistrates of the several States who are or may be authorized by law to make arrest for offenses against the United States, shall have the like authority to hold to security of the peace, and for good behavior in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States in cases cognizable before them. (Rev. Stats. sec. 727.)

§ 249 (728). **Power to enforce awards of foreign consuls, etc., in certain cases.**—The district and circuit courts, and the commissioners of the circuit courts, shall have power to carry into effect,

according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice-consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice-counsel or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge; application for the exercise of such power being first made to such court or commissioner by petition of such consul, vice-counsel, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice-consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice-consul, or commercial agent; *provided, however,* that the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice-consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all

such process, and do all other acts necessary and proper to carry into effect the premises under the authority of the said courts and commissioners. (Rev. Stats. sec. 728.)

§ 250. **Proceedings to enjoin comptroller of the currency.**—All proceedings by any national banking association to enjoin the comptroller of the currency under the provisions of any law relative to national banking associations shall be had in the district where such association is located. (Rev. Stats. sec. 736.)

§ 251. **Suits, in what district brought.**—Generally, no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant. (25 U. S. Stats. 434.)

See ante, sections 26 and 87 and notes.

Application of statute.—This section does not apply to Territorial courts. (Salisbury v. Sands, 2 Dill. 270; Fed. Cas. No. 12251.) Its provisions apply to process in equity as well as at law (Winter v. Ludlow, 3 Phila. 464; Fed. Cas. No. 17891); as on a bill filed to set aside a foreclosure sale. (Pacific

R. R. v. Missouri Pac. Ry. Co. 1 McCrary, 647; 3 Fed. Rep. 772.) It applies exclusively to original process. (Picquet v. Swan, 5 Mason, 35; Fed. Cas. No. 11134.) The statute of Indiana of May 29, 1879, relating to procedure in actions against foreign corporations, their officers or agents, does not apply to causes arising outside the State. (Grover v. Amer. Express Co., 11 Fed. Rep. 386.) This section applies to suits for relief against interfering patents. (Liggett etc. Co. v. Miller, 1 Fed. Rep. 203.) It inhibits the suing of any person in any other district than the district in which he resides. (Lovejoy v. Hartford Fire Ins. Co., 11 Fed. Rep. 64.) The provisions of this section are applicable to patent suits. (Chaffe v. Hayward, 20 How. 208; Allen v. Blunt, 1 Blatchf. 480; Fed. Cas. No. 215; Day v. Newark Manuf. Co., 1 Blatchf. 628; Fed. Cas. No. 3685.) A bill to obtain relief against a judgment is deemed an auxiliary suit, and the subpoena may be served in another district (Logan v. Patrick, 5 Cranch, 288; Dunlap v. Stetson, 4 Mason, 349; Fed. Cas. No. 4164); and if plaintiff is nonresident, it may be served on plaintiff's attorney. (Dunn v. Clarke, 8 Peters, 1; Seegee v. Thomas, 3 Blatchf. 11; Fed. Cas. No. 12633; Hitner v. Suckley, 2 Wash. C. C. 465; Fed. Cas. No. 6543; Read v. Conseqna, 4 Wash. C. C. 174; Fed. Cas. No. 11606; Eckert v. Bauert, 4 Wash. C. C. 370; Fed. Cas. No. 4266; Ward v. Seabry, 4 Wash. C. C. 426; Fed. Cas. No. 17161. See additional notes, p. ante §§ 26, 87.

Territorial limit of jurisdiction.—A court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. (Picquet v. Swan, 5 Mason, 35; Fed. Cas. No. 11134; Ex parte Graham, 3 Wash. C. C. 456; Fed. Cas. No. 5657.) Whatever may be the extent

of the jurisdiction over the subject-matter in a suit in respect to jurisdiction over persons and property, it can only be exercised within the limits of the judicial district. (Toland v. Sprague, 12 Peters, 300; Picquet v. Swan, 5 Mason, 35; Fed. Cas. No. 11134.) Where a citizen of New Hampshire and a citizen of Georgia sued a citizen of Massachusetts in New York, where he was arrested, the court had no jurisdiction. (Moffat v. Soley, 2 Paine, 103; Fed. Cas. No. 9688.) Where there are two districts in a State, a citizen of such State is liable to suit in either district if served with process. (McMicken v. Webb, 11 Peters, 25; Vore v. Fowler, 2 Bond, 294; Fed. Cas. No. 17003; Locomotive Co. v. Erie R. Co., 10 Blatchf. 292; Fed. Cas. No. 8452.)

Jurisdiction, how acquired.—A Federal court acquires jurisdiction over parties only by a service of process or by their voluntary appearance (Herndon v. Ridgway, 17 How. 424), and only by service of process within the district (Allen v. Blount, 1 Blatchf. 480; Fed. Cas. No. 215; Union Sugar Refi. v. Matthiessen, 2 Cliff. 304; Fed. Cas. No. 14397), and not then if he is but temporarily within the district. (Smith v. Tuttle, 5 Biss. 159; Fed. Cas. No. 13120.) A person who comes within the district merely for the purpose of attending a trial in a State court cannot be served with process issuing out of a United States court (Juneau Bank v. McSpedan, 5 Biss. 64; Fed. Cas. No. 7582); and if served with summons while attending the trial of a cause in the circuit court as a party, the service will be set aside.) Parker v. Hotchkiss, 1 Wall. Jr. 269; Fed. Cas. No. 10739; contra, Blight v. Fisher, Peters. C. C. 41; Fed. Cas. No. 1542.) Where defendant, not an inhabitant of the district, is inveigled or enticed into the district by false representations or

deceptive contrivances, service of process on him within the district is illegal. (Steiger v. Bonn, 4 Fed. Rep. 17; Union Sugar Refi. v. Matthiessen, 2 Cliff. 304; Fed. Cas. No. 14397.) If a nonresident comes into the district for the purpose of pleading to an indictment and giving bail, he cannot be sued before he has a reasonable time to depart. (U. S. v. Bridgman, 9 Biss. 221; Fed. Cas. No. 14645.) If defendant is a nonresident of the district, the record must show with certainty that process was served upon him within the district. (Allen v. Blunt, 1 Blatchf. 480; Fed. Cas. No. 215; Vore v. Fowler, 2 Bond, 294; Fed. Cas. No. 17003; McCloskey v. Webb, 2 Bond, 16; Fed. Cas. No. 8702; Thayer v. Wales, 5 Fish. 448; Fed. Cas. No. 13872.)

Waiver of irregularities.—A Federal court has no authority to issue process to another district. (Herndon v. Ridgway, 17 How. 424.) So the process of a circuit court cannot be served without the district in which it is established except by special authority of law. (Toland v. Sprague, 12 Peters, 300; Ex parte Graham, 3 Wash. C. C. 456; Fed. Cas. No. 5657; Wilson v. Graham, 4 Wash. C. C. 53; Fed. Cas. No. 17804.) In proceedings for relief against an interfering patent under section four thousand nine hundred and eighteen, Revised Statutes, no provision is made for service of notice on parties outside of the district. (Liggett v. Miller, 1 McCrary, 31; 1 Fed. Rep. 203.) No judgment can be rendered against a defendant who has not been served with process in the manner pointed out, unless the defendant waives the necessary process by entering his appearance. (Levy v. Fitzpatrick, 15 Peters, 167.) A party defendant may plead service of process on him out of the district by plea in abatement of the suit. (Van Antwerp v. Hulburd,

7 Blatchf. 426; Fed. Cas. No. 16826.) Where a defendant appears without taking exceptions, it is an admission of the regularity of the service (Gracie v. Palmer, 8 Wheat. 699); but if he appears and answers the bill, he cannot on the hearing object that the bill contained a prayer for process, or that he was not served. (Seegee v. Thomas, 3 Blatchf. 11; Fed. Cas. No. 12633.) And if he appears and pleads on the merits, it is a waiver of irregularity. (Toland v. Sprague, 12 Peters, 300; Pollard v. Dwight, 4 Cranch, 421; Irvine v. Lowry, 14 Peters, 293); see ante, section 26 and note.

Corporations.—A corporation can have no existence beyond the limits of the State in which it is created; hence, service of process upon its officers in another State will not confer jurisdiction upon a circuit court in that State over the corporation. (Northern Ind. R. Co. v. Michigan Cent. R. Co., 15 How. 233; Day v. Newmark Manuf. Co., 1 Blatchf. 628; Fed. Cas. No. 3685; Decker v. New York B. & P. Co., 11 Blatchf. 76; Fed. Cas. No. 3727; Myers v. Dorr, 13 Blatchf. 22; Fed. Cas. No. 9988.) As a corporation cannot be made a party to a civil suit by original process in any other district than the State wherein it was created (Myers v. Dorr, 13 Blatchf. 22; Fed. Cas. No. 4988), so a national bank cannot be sued out of the district in which it is located (Main v. Second Nat. Bank, 6 Biss. 26; Fed. Cas. No. 8976); but a trading corporation may be sued in any district in which it conducts its business (Hayden v. Androscoggin Mills, 1 Fed. Rep. 93), and a foreign corporation may be sued in a district other than that of which it is a resident if it has a duly authorized resident agent, qualified to acknowledge service of process (Runkle v. Lamar Ins. Co., 2 Fed. Rep. 9; Moch v. V. F. & M. Ins. Co.,

10 Fed. Rep. 696); or if it consents that process may be served on its agent in such State, jurisdiction attaches. (Ex parte Schollenberger, 96 U. S. 369; Knott v. Southern L. Ins. Co., 2 Woods, 479; Fed. Cas. No. 7894; Ehrman v. Teutonia Ins. Co., 1 Fed. Rep. 471; Runkle v. Lamar Ins. Co., 2 Fed. Rep. 9; Fonda v. British Am. Ins. Co., 10 Chic. L. N. 309; Fed. Cas. No. 4904; Albright v. Empire Trans. Co., 18 Alb. L. J. 313; contra, Pomeroy v. New York & N. H. R. Co., 4 Blatchf. 120; Fed. Cas. No. 11261; Southern & A. T. R. Co. v. New Orleans M. & T. R. Co., 2 Cent. L. J. 88; Fed. Cas. No. 13185; Stillwell v. Empire F. Ins. Co., 4 Cent. L. J. 463; Fed. Cas. No. 13449). A foreign corporation doing business within the State is liable to suit by service of process on an agent (Albright v. Empire Trans. Co., 18 Alb. L. J. 313; Fed. Cas. No. 17720; see Brownell v. T. & B. R. Co., 3 Fed. Rep. 761; Moch v. V. F. & M. Ins. Co., 10 Fed. Rep. 696), although there is no State law requiring it to appoint an agent to accept service of process. (Wilson Pack. Co. v. Hunter, 8 Biss. 429; Fed. Cas. No. 17852.) See ante, section 26 and note.

A personal privilege, and may be waived.—This section is not a denial of jurisdiction, but the grant of a privilege to defendant not to be sued out of the State where he resides, unless served with process in the State where suit is brought (Harrison v. Rowan, Peters, C. C. 489; Fed. Cas. No. 6140); and under its provisions the privilege granted to him may be waived (Flanders v. Aetna Ins. Co., 3 Mason, 158; Fed. Cas. No. 4852; see Lovejoy v. Hartford F. Ins. Co., 11 Fed. Rep. 63), as by voluntary appearance (Harrison v. Rowan, Peters, C. C. 489; Fed. Cas. No. 6140; Hale v. Contin. Ins. Co., 12 Fed. Rep. 359); and his appearance

without process is a waiver of the privilege to object to the nonservice of process. (Gracie v. Palmer, 8 Wheat. 699; Segree v. Thomas, 3 Blatchf. 11; Fed. Cas. No. 12633; Kelsey v. Pennsylvania R. Co., 14 Blatchf. 89; Fed. Cas. No. 7679; McCloskey v. Cobb, 2 Bond, 16; Fed. Cas. No. 8702; Flanders v. Aetna Ins. Co., 3 Mason, 158; Fed. Cas. No. 4852; Harrison v. Rowan, Peters, C. C. 489; Fed. Cas. No. 6140; Clarke v. Navigation Co., 1 Story, 531; Fed. Cas. No. 2859.) So appearing and moving to dismiss the bill for want of equity (Jones v. Andrews, 10 Wall. 327), or an appearance unaccompanied by a plea claiming the privilege, is a waiver of it. (Harrison v. Rowan, Peters, C. C. 489; Fed. Cas. No. 6140.) For an appearance to confer jurisdiction, the party must be a party to the record. (Kentucky S. M. Co. v. Day, 2 Sawy. 468; Fed. Cas. No. 7719.) If a party is a nonresident he may appear in the suit and plead his personal privilege (Teese v. Phelps, 1 McAll. 17; Fed. Cas. No. 13818), and such an appearance is not a waiver (Harrison v. Rowan, Peters C. C. 489; Fed. Cas. No. 6140); but it is not a waiver to appear and plead to the jurisdiction by an attorney. (Commercial Bank v. Slocomb, 14 Peters, 60; Thayer v. Wales, 5 Fish Pat. Cas. 448; Fed. Cas. No. 13872; Decker v. New York B. & P. Co., 11 Blatchf. 76; Fed. Cas. No. 3727.) Where a bill was filed in the southern district of Mississippi against four defendants, two of whom appeared for the purpose of moving to dismiss the bill, and the other two declined to appear and process was not served on them, the court had no alternative but to dismiss the bill, they being necessary parties. (Herndon v. Ridgway, 17 How. 424.) See ante, sections 26 and 87 and notes.

Process by attachment.—An attachment against the property of a nonresident cannot be sued out,

unless the defendant is first personally served with process. (Ex parte Des Moines R. R. Co., 2 Morr. Trans. 303.) The circuit court has no jurisdiction in attachment suits against a nonresident without the district. (Hollingsworth v. Adams, 2 Dall. 396; Toland v. Sprague, 12 Peters, 300; Chaffee v. Hayward, 20 How. 208; Day v. Newark Manuf. Co., 1 Blatchf. 628; Fed. Cas. No. 3685; Sadler v. Hudson, 2 Curt, 6; Fed. Cas. No. 12206; Mauldin v. Carll, 3 Hughes, 249; Fed. Cas. No. 9307; Picquet v. Swan, 5 Mason, 35; Fed. Cas. No. 11134; Richmond v. Dreyfos, 1 Sum. 131; Fed. Cas. No. 11799.) Process of foreign attachment cannot be properly issued by the circuit court in cases where defendant is domiciled abroad or not found within the district, so that it can be served upon him (Toland v. Sprague, 12 Peters 300; Anderson v. Shaffer, 10 Fed. Rep. 266), and this applies to corporations. (Myers v. Dorr, 13 Blatchf. 22; Fed. Cas. No. 9988.) Process of attachment on the effects of a person not an inhabitant cannot be served (Pollard v. Dwight, 4 Cranch, 424); but if served not only on the property but on the defendant, jurisdiction attaches. (North v. McDonald, 1 Biss. 57; Fed. Cas No. 10312.) An assignee appointed by a bankrupt court of another district is within the rule although there is property within the district. (Shainwald v. Lewis, 5 Fed. Rep. 510; S. C., 6 Sawy. 585.) Where a citizen of the United States is a resident in a foreign country, the circuit court has no jurisdiction over a suit brought by an alien, although he has property within the district which may be attached. (Picquet v. Swan, 5 Mason, 35; Fed. Cas. No. 11134.)

Civil suits.—"Civil suit" means a suit within the category of "all suits of a civil nature at common law or in equity," and a case of admiralty jurisdiction is not within the meaning of this prohibition.

(Atkins v. Disintegrating Co., 18 Wall. 272; Casey v. Leary, 2 Ben. 530; Fed. Cas. No. 2497; Manchester v. Hotchkiss; 13 Int. Rev. Rec. 125; Fed. Cas. No. 9004; but see Ex parte Graham, 3 Wash. C. C. 456; Fed. Cas. No. 5657; Wilson v. Pierce, 15 Law Rep. 137; New England Ins. Co. v. Navigation Co., 13 Int. Rev. Rec. 94; Fed. Cas. No. 10154.) This provision does not apply to a person who has never been an inhabitant of the United States. (Cushing v. Laird, 4 Ben. 70; Fed. Cas. No. 3508.) A prize proceeding is a civil suit, and if against the person can be instituted only in the district where he is an inhabitant. (Ex parte Graham, 3 Wash. C. C. 456; Fed. Cas. No. 5657.) Attachment will lie against in debt or contract or tort. (McGrath v. Candalero, Bee, 64; Fed. Cas. No. 8810; Bouysson v. Miller, Bee, 186; Fed. Cas. No. 1709.) It may be issued against a nonresident in an action on contract, even if the nonresident be a corporation. (Clarke v. Navigation Co., 1 Story, 531; Fed. Cas. No. 2859.)

§ 252 (747). **Parties may plead their own causes.**—In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys-at-law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein. (Rev. Stats. sec. 747.)

Attorney.—When an attorney is selected to conduct and manage the case, the attorney stands in the place of the party and has exclusive control and management, and his client cannot appoint an agent to represent him in the suit. (Nightingale v. Oreg. Cent. R. R. Co., 2 Sawy. 338; Fed. Cas. No. 10264.) The presumption is that an attorney appear-

ing in court for a party has authority to do so; and where the want of authority is questioned the burden of proof is on the party attacking. Authority must be questioned by direct attack, and may be challenged by motion to dismiss the action to compel the party to show authority to vacate the appearance; and in cases where the validity of any order, judgment or decree depends upon the jurisdiction of the court over the person of the party acquired solely by appearance by attorney, the authority may be challenged on a motion to vacate the order, judgment or decree (Bonnifield v. Thorp, 71 Fed. Rep. 924). Where a party appears by attorney all the preceedings in court must be conducted, and all acts affecting the remedy and not the cause incidental to the prosecution of the cause, such as a stipulation extending time to answer, must be done by the attorney (Bonnifield v. Thorp, 71 Fed. Rep. 924).

Attorney's fees—Lien.—The Federal courts protect attorneys of record in their fees (Frink v. McComb, 60 Fed. Rep. 486; United States v. Boyd, 79 Fed. Rep. 858; Blair v. Harrison, 18 U. S. App. 27; 57 Fed. Rep. 257; Foster v. Danforth, 59 Fed. Rep. 750).

§ 253 (748). **Officers forbidden to practice as attorneys.**—No clerk, assistant, or deputy clerk, of any territorial district, or circuit court, or of the court of claims, or the supreme court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel, in any cause depending in either of said courts, or in any district for which he is acting as such officer. (Rev. Stats. sec. 748.)

§ **254** (749). **Penalty.**—Whosoever violates the preceding section shall be stricken from the roll of attorneys by the court, upon complaint, upon which the respondent shall have due notice, and be heard in his defense; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office. (Rev. Stats. sec. 749.)

§ **255** (750). **Final record.**—In equity and admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record. (See sec. 698. Rev. Stats. sec. 749.)

CHAPTER XV.

OFFICERS OF UNITED STATES COURTS.

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§ 256. **Relatives of judge not to be appointed officers.**—That no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member. (Approved March 3, 1887; August 13, 1888, sec. 7; 24 U. S. Stats. 552; 25 U. S. Stats. 433.)

Person related to judge not to be officer.—The provision that no Federal judge shall "hereafter" appoint to any office or duty in the courts a person related to him within the degree of first cousin, does not invalidate such an appointment previously made (Northwestern Mutual Life Ins. Co. v. Seaman, 80 Fed. Rep. 357). Quaere, whether two men who marry sisters are so related by affinity or consanguinity that one of them, if he be a Federal judge, may not appoint the other a special master to hear and report on an isolated case (Farmer's Loan & Trust Co. v. Iowa Water Co., 80 Fed. Rep. 468). A final decree entered on the report of a special master, appointed in violation of the above section, is not thereby rendered absolutely void so that the court will have power to set it aside on motion at a subsequent term (Farmer's Loan & T. Co. v. Iowa Water Co., 80 Fed. Rep. 467).

§ 257. **Clerk not to be receiver or master.**—No clerk of the district or circuit courts of the United States, or their deputies, shall be appointed a receiver or a master in any case except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment. (20 U. S. Stats. 415; 1 Sup. Rev. Stats. 464.)

Clerk as master.—An order appointing a clerk of a Federal court as master in chancery without giving any special reason therefor as required by the above section is sufficient, however irregular, to clothe him with the insignia of the office so that his acts will be those of a de facto incumbent and not subject to question in a collateral proceeding (Northwestern Mut. Life Ins. Co. v. Seaman, 80 Fed. Rep. 357).

§ 257 a. **Persons not to be commissioner or receiver.**—That no marshal or deputy marshal, attorney or assistant attorney of any district, jury commissioner, clerk of marshal, no bailiff, crier, juror, janitor of any government building, nor any civil or military employee of the government, except as in this act provided, and no clerk or employee of any United States justice or judge shall have, hold or exercise the duties of United States commissioner. And it shall not be lawful to appoint any of the officers named in this section receiver or receivers in any case or cases now pending or that may be hereafter brought in the courts of the United States. (29 U. S. Stats. 184.)

§ 258. **Extra compensation.**—That no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the treasury or property of the United States beyond his salary or compensation allowed by law; *provided*, that this shall not be construed to prevent the employment and payment by the department of justice of district attorneys as now allowed by law for the performances of services not covered by their salaries or fees. (Approved June 20, 1874. See Rev. Stats. secs. 619, 767, 776, 843.)

Note.—By an act which took effect on July 1, 1896, 29 U. S. Stats. 179, all fees and emoluments authorized by law to be paid to district attorneys and marshals were directed to be charged as theretofore, and collected and paid to the clerk of the court, having jurisdiction, and by him covered into the treasury of the United States. In lieu of the fees al-

lowed to the marshals and district attorneys they now receive salaries as provided by the act.

§ 259. **Residence of officers.**—That every clerk of the circuit or district court of the United States, United States marshal, or United States district attorney, shall reside permanently in the district where his official duties are to be performed, and shall give his personal attention thereto; and in case any such officer shall remove from his district, or shall fail to give personal attention to the duties of his office, except in case of sickness, such office shall be deemed vacant; *provided*, that in the southern district of New York said officers may reside within twenty miles of their districts. (See secs. 619, 767, 776; 18 U. S. Stats. 109; 1 Sup. Rev. Stats. 47.)

By an act which went into effect July 1, 1896, the attorney general is authorized to fix and declare the place of residence of the district attorney and of each of his assistants, *provided*, the said assistants must be residents of the district for which they are appointed. (29 U. S. Stats. 181.) The marshal's official residence shall be deemed to be at one of the places of holding court in the district, and the attorney general shall be authorized to fix and declare the place of such official residence. (29 U. S. Stats. 183.)

All acts and portions of acts inconsistent with this act are hereby repealed. (29 U. S. Stats. 186.)

§ 260. **District attorneys.**—There shall be appointed in each district a person learned in the law,

to act as attorney for the United States in such district. (Rev. Stats. secs. 767, 776.)

§ 261. **Term and oath of district attorney.**—District attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates. And every district attorney, before entering upon his office, shall be sworn to a faithful execution thereof. (Rev. Stats. sec. 768.) The attorneys and marshals of the United States, including the District of Columbia and the territories, shall continue to discharge the duties of their respective offices, unless sooner removed by the President, until their successors shall be appointed and qualify in their stead. But they shall be appointed and commissioned for the term of four years as now provided by law. (30 U. S. Stats. 487.)

Term.—The president has power to remove a district attorney within the four years for which he was appointed, and to appoint his successor. (Parsons v. United States, 167 U. S. 324.)

§ 261 a. **Assistant district attorneys—Appointment—Compensation.**—That whenever, in the opinion of the district judge of any district or the chief justice of any territory and the district attorney, evidenced by writing, the public interest requires it, one or more assistant district attorneys may be appointed, by the attorney general; but such opinion shall state to the attorney general the facts as distinguished from conclusions, showing the necessity therefor. Such assistant district at-

torneys shall be paid such salary as the attorney general may from time to time determine as to each, which shall in no case exceed two thousand five hundred dollars per annum; *provided*, that the necessary expenses for lodging and subsistence actually paid, not exceeding four dollars per day and actual and necessary traveling expenses of the district attorney and his assistants, while absent from their respective official residences and necessarily employed in going to, returning from and attending before any United States court commissioner or other committing magistrate, and while otherwise necessarily absent from their respective official residences on official business shall be allowed and paid in the manner hereinafter provided. (29 U. S. Stats. 181, sec. 8.)

As to compensation without certificate of the attorney general, see United States v. Crossthwaite, 168 U. S. 375.)

§ 261 b. **District attorneys, when may employ clerks.**—That the district attorney of any judicial district, when the facts showing the necessity therefor are certified by the district judge to the attorney general, may with the approval of the attorney general, and no longer than such approval lasts, employ necessary clerical assistance at such salary or salaries as shall be from time to time fixed by the attorney general. (29 U. S. Stats. 183, sec. 15.)

Note.—A lawyer appointed by a district attorney, ostensibly as a clerk, but to assist him in the duties of his office, pursuant to a letter from the attorney-

general authorizing such appointment on condition that the appointee should look solely to the district attorney for his compensation, which was to be paid out of the emoluments of the office, is not an employee of the United States. (United States v. McDonald, 44 U. S. App. 461; 72 Fed. Rep. 898.)

§ 262. **Salaries of district attorneys.**—That the United States district attorney for each of the following judicial districts of the United States shall be paid in lieu of the salaries, fees, per centums, and other compensations now allowed by law an annual salary as follows: For the northern and middle districts of the State of Alabama, each four thousand dollars; for the southern district of the State of Alabama, three thousand dollars; for the Territory of Arizona, four thousand dollars; for the eastern district of Arkansas, four thousand dollars; for the western district of Arkansas, five thousand dollars; for the northern district of California, four thousand five hundred dollars; for the southern district of California, three thousand five hundred dollars; for the district of Colorado, four thousand dollars; for the district of Connecticut, two thousand five hundred dollars; for the district of Delaware, two thousand dollars; for the northern district of Florida, three thousand five hundred dollars; for the southern district of Florida, three thousand five hundred dollars; for the northern district of Georgia, five thousand dollars; for the southern district of Georgia, three thousand five hundred dollars; for the district of Idaho, three thousand dollars; for the northern district of Illinois, five thousand dollars; for the southern district

of Illinois, five thousand dollars; for the district of Indiana, five thousand dollars; for the northern and southern districts of Iowa, each four thousand five hundred dollars; for the district of Kansas, four thousand five hundred dollars; for the district of Kentucky, five thousand dollars; for the eastern district of Louisiana, three thousand five hundred dollars; for the western district of Louisiana, two thousand five hundred dollars; for the district of Maine, three thousand dollars; for the district of Maryland, four thousand dollars; for the district of Massachusetts, five thousand dollars; for the eastern district of Michigan, four thousand dollars; for the western district of Michigan, three thousand five hundred dollars; for the district of Minnesota, four thousand dollars; for the northern and southern districts of Mississippi, each three thousand five hundred dollars; for the eastern district of Missouri, four thousand five hundred dollars; for the western district of Missouri, four thousand five hundred dollars; for the district of Montana, four thousand dollars; for the district of Nebraska, four thousand dollars; for the district of Nevada, three thousand dollars; for the district of New Hampshire, two thousand dollars; for the district of New Jersey, three thousand dollars; for the district of New Mexico, four thousand dollars; for the northern district of New York, four thousand five hundred dollars; for the eastern district of New York, four thousand five hundred dollars; for the eastern district of North Carolina, four thousand dollars; for the western district of North Car-

olina, four thousand five hundred dollars; for the district of North Dakota, four thousand dollars; for the northern and southern districts of Ohio, each four thousand five hundred dollars; for the district of Oklahoma, five thousand dollars; for the district of Oregon, four thousand five hundred dollars; for the eastern district of Pennsylvania, four thousand five hundred dollars; for the western district of Pennsylvania, four thousand five hundred dollars; for the district of Rhode Island, two thousand five hundred dollars; for the eastern and western districts of the district of South Carolina, four thousand five hundred dollars, two thousand five hundred dollars of which shall be for the performance of the duties of district attorney for the western district; for the district of South Dakota, four thousand dollars; for the eastern, middle and western districts of Tennessee, each four thousand five hundred dollars; for the northern district of Texas, three thousand five hundred dollars; for the eastern district of Texas, five thousand dollars, for the western district of Texas, four thousand dollars; for the district of Utah, four thousand dollars; for the district of Vermont, three thousand dollars; for the eastern district of Virginia, four thousand dollars; for the western district of Virginia, four thousand five hundred dollars; for the district of Washington, four thousand five hundred dollars; for the district of West Virginia, four thousand five hundred dollars; for the eastern district of Wisconsin, four thousand dollars; for the western

district of Wisconsin, four thousand dollars; for the district of Wyoming, four thousand dollars. (29 U. S. Stats. 180.)

Note.—All salaries provided for in the above section are payable monthly. (29 U. S. Stats. 183, sec. 16.)

§ 262 a. **Salaries of district attorneys, New York.**—The district attorney for the southern district of New York is entitled to receive quarterly, for all his services, a salary at the rate of six thousand dollars a year. (Rev. Stats. sec. 770.)

§ 263. **Duties of district attorneys.**—It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the secretary of the treasury, to appear in behalf of the defendants in all suits and proceedings in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the treasury. (Rev. Stats. sec. 771.)

§ 264. **Statement of suits.**—Every district attorney shall, on instituting any suit for the recovery of any fine, penalty, or forfeiture, immediately transmit to the solicitor of the treasury a statement thereof. (Rev. Stats. sec. 772.)

§ 265. **Return of district attorneys to treasury.**—Every district attorney shall, immediately after the end of every term of the circuit and district court for his district, forward to the solicitor of the treasury, except in the cases provided in the next section, a full and particular statement accompanied by the certificate of the clerks of said courts, respectively, of all causes pending in said courts, and of all causes decided therein during such term, in which the United States are party. He shall also, on the first day of October in each year, make a return to said solicitor of the number of suits and proceedings commenced, pending and determined within his district during the fiscal year next preceding the date of such return, showing the date when such proceeding or suit in each case was commenced. If the determination thereof has been delayed or continued beyond the usual or reasonable period, the reasons must be set forth, and a statement must be made of the measures taken by the district attorney to press such proceedings or suit to a close. (Rev. Stats. sec. 773.)

§ 266. **Returns of internal revenue.**—When any suit or proceeding arising under the internal revenue laws, to which the United States are party, or any suit or proceeding against a collector or other officer of the internal revenue, wherein a district attorney appears, is commenced, the attorney for the district in which it is brought shall immediately report to the commissioner of internal revenue the full particulars relating to the

same; and he shall, immediately after the end of each term of the court in which such suit or proceeding is pending, forward to the said commissioner a full and particular statement of its condition. (Rev. Stats. sec. 774.)

§ 267. **Reports of district attorney.**—Each district attorney shall, immediately after the end of every term in which any suit for moneys due on account of the postoffice department has been pending in his district, forward to the department of justice a statement of any judgment or order made, or step taken in the same, during such term, accompanied by a certificate of the clerk, showing the parties to and amount of every such judgment, with such other information as the department of justice may require. And the said attorney shall direct speedy and effectual execution upon said judgment, and the United States marshal to whom the same is directed shall make returns of the proceedings thereon to the department of justice at such times as it may direct. (Rev. Stats. sec. 775.)

§ 268. **Marshals' term.**—Marshals shall be appointed for a term of four years. (Rev. Stats. sec. 779.) The attorneys and marshals of the United States, including the District of Columbia and the Territories, shall continue to discharge the duties of their respective offices, unless sooner removed by the President, until their successors shall be appointed and qualify in their stead. But they shall be appointed and commissioned for the

term of four years as now provided by law. (30 U. S. Stats. 487.)

§ 269. **Deputy marshals — Revised Statutes.**— Every marshal may appoint one or more deputies, who shall be removable from office by the judge of the district court or by the circuit court for the district, at the pleasure of either. (Rev. Stats. sec. 780.)

Note.—Is the above section superseded or repealed by the next two sections, 269 a, 269 b? A deputy marshal is not an officer of the United States, and cannot maintain a suit against them for services rendered. (Powell v. United States, 60 Fed. Rep. 687.) The marshal of Alaska is liable for acts done by deputies under color of office in serving processes. (Holden v. Williams, 75 Fed. Rep. 798.)

§ 269 a. **Deputy marshals—Office deputies—Act of 1896.**—That, when in the opinion of the attorney-general, the public interest requires it, he may on the recommendation of the marshal, which recommendation shall state the facts as distinguished from conclusions, showing necessity for the same, allow the marshals to employ necessary office deputies and clerical assistance, upon salaries to be fixed by the attorney-general from time to time, and paid as hereinafter provided. When any of such office deputies is engaged in the service or attempted service of any writ, process, subpoena, or other order of the court, or when necessarily absent from the place of his regular employment, on official business, he shall be allowed his actual traveling expenses only, and his necessary and

actual expenses for lodging and subsistence, not to exceed two dollars per day, and the necessary actual expenses in transporting prisoners, including necessary guard hire; and he shall make and render accounts thereof as hereinafter provided. (29 U. S. Stats. 182, sec. 10.)

Note.—An office deputy marshal appointed by the joint action of the attorney-general and the marshal under the above act is protected by the civil service rules, and is not subject to removal by the mashal. (Priddie v. Thompson, 82 Fed. Rep. 186; but see Dudley v. James, 83 Fed. Rep. 345.)

§ 269 b. **Deputy marshals—Field deputies—Act of 1896.**—That, at any time when in the opinion of the marshal of any district, the public interest will thereby be promoted, he may appoint one or more deputy marshals for such district, who shall be known as field deputies, and who, unless sooner removed by the district court as now provided by law, shall hold office during the pleasure of the marshal, except as hereinafter provided, and who shall each as his compensation receive three-fourths of the gross fees, including mileage as provided by law, earned by him, not to exceed one thousand five hundred dollars per fiscal year, or at that rate for any part of a fiscal year; and, in addition, shall be allowed his actual necessary expenses, not exceeding two dollars a day, while endeavoring to arrest, under process, a person charged with or convicted of crime; *provided*, that a field deputy may elect to receive actual expenses on any trip in lieu of mileage; *provided*, that in spe-

cial cases where in his judgment justice requires, the attorney-general may make an additional allowance, not, however, in any case to make the aggregate annual compensation of any field deputy in excess of twenty-five hundred dollars, nor more than three-fourths of the gross fees earned by such field deputy. (29 U. S. Stats. 182, sec. 11.)

§ 270. **Marshals' salaries.**—That the United States marshal for each judicial district of the United States shall be paid, in lieu of the salaries, fees, per centums, and other compensation now allowed by law, an annual salary as follows: For the northern and middle districts of the State of Alabama, each four thousand dollars; for the southern district of the State of Alabama, three thousand dollars; for the Territory of Arizona, four thousand dollars; for the eastern district of Arkansas, four thousand dollars; for the western district of Arkansas, five thousand dollars; for the northern district of California, four thousand dollars; for the southern district of California, three thousand dollars; for the district of Colorado, four thousand dollars; for the district of Connecticut, two thousand dollars; for the district of Delaware, two thousand dollars; for the District of Columbia, five thousand five hundred dollars; for the northern and southern districts of Florida, each three thousand dollars; for the northern district of Georgia, five thousand dollars; for the southern district of Georgia, three thousand five hundred dollars; for the district of

Idaho, three thousand dollars; for the northern district of Illinois, five thousand dollars; for the southern district of Illinois, four thousand five hundred dollars; for the district of Indiana, four thousand five hundred dollars; for the northern and southern districts of Iowa, each four thousand dollars; for the district of Kansas, four thousand dollars; for the district of Kentucky, five thousand dollars; for the eastern district of Louisiana, three thousand dollars; for the western district of Louisiana, two thousand five hundred dollars; for the district of Maine, three thousand dollars; for the district of Maryland, three thousand five hundred dollars; for the district of Massachusetts, five thousand dollars; for the eastern district of Michigan, four thousand dollars; for the western district of Michigan, three thousand dollars; for the district of Minnesota, four thousand dollars; for the northern and southern districts of Mississippi, each three thousand dollars; for the eastern district of Missouri, four thousand dollars; for the western district of Missouri, four thousand dollars; for the district of Montana, three thousand five hundred dollars; for the district of Nebraska, three thousand five hundred dollars; for the district of Nevada, two thousand five hundred dollars; for the district of New Hampshire, two thousand dollars; for the district of New Jersey, three thousand dollars; for the district of New Mexico, four thousand dollars; for the northern district of New York, five thousand dollars; for the eastern district of New York, four thousand dollars; for the southern

district of New York, five thousand dollars; for the eastern district of North Carolina, four thousand dollars; for the western district of North Carolina, four thousand five hundred dollars; for the district of North Dakota, four thousand dollars; for the northern and southern districts of Ohio, each four thousand dollars; for the district of Oklahoma, five thousand dollars; for the district of Oregon, four thousand dollars; for the eastern district of Pennsylvania, four thousand dollars; for the western district of Pennsylvania, four thousand dolars; for the district of Rhode Island, two thousand dollars; for the eastern and western districts of the district of South Carolina, four thousand five hundred dollars, two thousand five hundred dollars of which shall be for the performance of the duties of marshal of the western district; for the district of South Dakota, four thousand dollars; for the eastern, middle and western districts of Tennessee, each four thousand dollars; for the northern district of Texas, three thousand dollars; for the eastern district of Texas, five thousand dollars; for the western district of Texas, four thousand dollars; for the district of Utah, three thousand five hundred dollars; for the district of Vermont, two thousand five hundred dollars; for the eastern district of Virginia, three thousand five hundred dollars; for the western district of Virginia, four thousand dollars; for the district of Washington, four thousand dollars; for the district of West Virginia, four thousand dollars; for the eastern district of Wisconsin, four thou-

sand dollars; for the western district of Wisconsin, four thousand dollars; for the district of Wyoming, three thousand five hundred dollars. (29 U S. Stats. 181, sec. 9.)

Note 1.—All salaries provided for in the above section are payable monthly. (29 U. S. Stats. 183, sec. 16.)

Note 2.—Prior to the passage of the above act the marshals were allowed to retain fees collected up to a certain amount, and in certain districts marshals were allowed to receive salaries as compensation for extra services. (See Rev. Stats. secs. 781, 829, 841.)

§ 270 a. **Expenses allowed to marshals.**—That the marshal when attending court, at any place other than his official residence, and when engaged in the service or attempted service of any process, writ or subpoena, and when otherwise necessarily absent from his official residence on official business, shall be allowed his necessary expenses for lodging and subsistence not exceeding four dollars per day and his actual necessary traveling expenses. He shall also be allowed the actual necessary expenses in transporting prisoners, including necessary guard hire. An account of such expenses shall be made out and paid as hereinafter provided. (29 U. S. Stats. 183, sec. 12.)

§ 270 b. **Office expenses of district attorneys and marshals.**—That the necessary office expenses of the district attorneys and marshals shall be allowed when authorized by the attorney general. (29 U. S. Stats. 183, sec. 14.)

§ 270 c. **Expense accounts of district attorney and marshal, approval and payment.**—That whenever in this act an officer is allowed actual expenses, the account therefor shall be made out quarterly in accordance with rules and regulations prescribed by the attorney general. When made out the account shall be verified on oath before an officer authorized to administer oaths. The expense accounts of the marshals and their office deputies and the accounts of the field deputies shall be paid by the marshals; said accounts and the expense accounts of the district attorneys and their assistants, when made out in accordance with this act, shall be submitted to and examined by the circuit court or district court of the district, and when approved by the court shall be audited and allowed as now provided for by law. Each marshal shall make such returns of the earnings and expenses of his office as shall be required under rules and regulations prescribed by the Attorney-General; *provided,* that no office or field deputy shall receive compensation as bailiff, and no field deputy shall receive fees for representing the marshal in court. (29 U. S. Stats. 183, sec. 13.)

Note.—A marshal is not entitled, as between himself and the United States, to credit for unpaid disbursements, or for services rendered and fees earned by his deputies, unless he has paid for the same. (Fitzsimmons v. United States, 13 U. S. App. 166; 54 Fed. Rep. 812.)

§ 270 d. **Penalty for accepting compensation for services other than that provided by law.**—

That any officer whose compensation is fixed by sections six to fifteen, inclusive, of this act, who shall directly or indirectly demand, receive or accept any fee or compensation for the performance of any official service other than is herein provided, or shall willfully fail or neglect to account for or pay over to the proper officer any fee received or collected by him, shall, upon conviction thereof, be punished by a fine of not less than fifty dollars, nor more than five hundred dollars, or by imprisonment, at the discretion of the court, not exceeding five years, or by both such fine and imprisonment. (29 U. S. Stats. 183, sec. 18.)

§ 271. **Oaths of marshals.**—Every marshal and deputy marshal shall, before he enters upon the duties of his appointment, take, before the district judge of the district, an oath or affirmation in the following form: "I, A. B., do solemnly swear (or affirm) that I will faithfully execute all lawful precepts directed to the marshal of the district of ——, under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be) of the district of ——, during my continuance in said office, and take only my lawful fees. So help me God." The words "so help me God" shall be omitted in all cases where an affirmation is admitted instead of an oath; *provided*, that when any person who is appointed deputy marshal resides and is more than twenty miles from the place where the district

judge resides and is, the said oath of office may be taken by him before any judge or justice of any State court within the same district, or before any justice of the peace having authority therein, or before any notary public duly appointed in such State, or before any commissioner of a circuit court for such district, and shall, when certified by such officer to the said district judge, be as effectual as if taken before such district judge. (Rev. Stats. sec. 782.)

§ 271 a. **Oath of marshal, before whom taken.**—That the oath or oaths required to be taken by marshals and deputy marshals before entering upon the duties of their respective offices may be administered by any officer of the United States or of any State authorized by law to administer oaths. (29 U. S. Stats. 481.)

§ 272. **Marshal's bond.**—Every marshal, before he enters on the duties of his office, shall give bond before the district judge of the district, jointly and severally with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by said judge, in the sum of twenty thousand dollars, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the district court or circuit court sitting within the district, and copies thereof, certified by the clerk, under the seal of the said court, shall be competent evidence in any court of justice. (Rev. Stats. sec. 783.)

Note.—The district judge alone has authority to approve the bond (Jackson v. Simonton, 4 Cranch C. C. 255; Fed. Cas. No. 7147); and a bond with only one surety does not comply with the statute. (Jackson v. Simonton, 4 Cranch C. C. 255; Fed. Cas. No. 7147.) So a bond to the president is not a bond to the United States. (Jackson v. Simonton, 4 Cranch C. C. 255; Fed. Cas. No. 7147.) A marshal is not qualified until he gives the bond required and until it is received by the proper official (Jackson v. Simonton, 4 Cranch C. C. 255; Fed. Cas. No. 7147); but if he proves his commission and his recognition as marshal by the Federal courts, it will be presumed that he conformed to the requirements of the law. (Killpatrick v. Frost, 2 Grant, 168.) Where the question is as to the proper construction of a marshal's bond, the cause is removable into the circuit court. (Lawrence v. Norton, 13 Fed. Rep. 1.)

§ 273. **Returns to the solicitor of the treasury.**—Every marshal shall, within thirty days before the commencement of each term of the circuit and district courts in his district, make returns to the solicitor of the treasury of the proceedings had upon all writs of execution or other process, which have been placed in his hands for the collection of moneys adjudged and decreed to the United States in said courts, respectively. (Rev. Stats. sec. 791.)

§ 274. **Returns, postoffice department.**—Every marshal to whom any execution upon a judgment in any suit for moneys due on account of the postoffice department has been directed shall make returns to the sixth auditor, at such times as he may direct, of the proceedings which have taken place

upon the said process of execution. (Rev. Stats. sec. 792.)

§ 275. **Vacancies, how filled.**—In case of a vacancy in the office of district attorney or marshal within any circuit, the circuit justice of such circuit may fill the same, and the person appointed by him shall serve until an appointment is made by the President, and the appointee is duly qualified, and no longer. The appointment made by said justice shall be in writing, which shall be filed in the clerk's office of the circuit court, and a copy thereof shall be entered upon the journal of said court. Any marshal so appointed shall give bond, as if appointed by the President, and the bond shall be approved by said justice. It shall then be filed in the clerk's office of said court, and a copy shall be entered on the journal of the court. A certified copy of such entry shall be *prima facie* proof of the execution of such bond, and of the contents thereof. (Rev. Stats. sec. 793. See In re Farrow, 3 Fed. Rep. 116.)

Note.—Is the above section repealed by the next section?

§ 275 a. **Vacancies in office of district attorney or marshal, how filled.**—In case of a vacancy in either of said offices [attorney or marshal], the district court of the United States for the district where such vacancy exists, the supreme court of the Territory, and the supreme court of the District of Columbia may appoint persons to exercise the duties of such offices within their respective

jurisdictions, until such vacancy shall be filled. (30 U. S. Stats. sec. 487.)

Note.—See preceding section.

§ 276. Suits on marshal's bond—Costs.—In case of a breach of the condition of the marshal's bond, any person thereby injured may institute in his own name and for his sole use a suit on said bond, and thereupon recover such damages as shall be legally assessed, with costs of suit, for which execution may issue from him in due form. If such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant; and the United States shall in no case be liable for the same. (Rev. Stats. sec. 784.)

Note.—An action for a breach of the marshal's bond may be brought in the name of the United States for the benefit of the party whose interests are affected. (U. S. v. Davidson, 1 Biss. 433; Fed. Cas. No. 14921.) It may be brought in the circuit court, although all parties are citizens of the same State. (U. S. v. Davidson, 1 Biss. 433; Fed. Cas. No. 14921; Wetmore v. Rice, 1 Biss. 237; Fed. Cas. No. 17468; Adler v. Newcomb, 2 Dill. 45; Fed. Cas. No. 83.) A declaration for the breach should not claim the entire penalty but merely the damages sustained. (Adler v. Newcomb, 2 Dill. 45; Fed. Cas. No. 83.) If an execution creditor seeks to charge the sureties, he cannot proceed summarily, but must proceed according to law. (Gwin v. Breedlove, 2 How. 29; Gwin v. Barton, 6 How. 7.) The failure of the United States to present their claim against the estate of a deceased United States marshal constitutes no defense to an action

against the sureties on his official bond. (United States v. Adams, 54 Fed. Rep. 114.)

§ 277. **Marshal's bond to remain after judgment.**—The said bond shall remain, after any judgment rendered thereon, as a security for the benefit of any person injured by breach of the condition of the same, until the whole penalty has been recovered; and the proceedings shall always be as directed in the preceding section. (Rev. Stats. sec. 785.)

§ 278. **Limitation of bonds.**—No suit on a marshal's bond shall be maintained unless it is commenced within six years after the right of action accrues, saving, nevertheless, the rights of infants, married women, and insane persons, so that they sue within three years after their disabilities are removed. (Rev. Stats. sec. 786.)

Note.—This limitation does not apply to an action on the marshal's bond brought by the United States. (U. S. v. Rand, 4 Sawy. 272; Fed. Cas. No. 16116; U. S. v. Godbold, 3 Woods, 550; Fed. Cas. No. 15219.) The statute does not run against a claim of proceeds of a marshal's sale suspended by appeal until after affirmance of the decree. (Montgomery v. Hernandez, 12 Wheat. 129.)

§ 279. **Duties of marshal.**—It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power

to command all necessary assistance in the execution of his duty. (Rev. Stats. sec. 787.)

Note.—This section does not apply to a warrant in case of extradition; such a warrant may be served beyond the limits of the district. (In re Heinrich, 5 Blatchf. 414; Fed. Cas. No. 6369.) There is no restriction as to districts from which precepts issue, or to which they are to be returned (Voss v. Lake, 1 Cranch C. C. 331; Fed. Cas. No. 17014); but the subpoena should be issued to the marshal of the district where witness lives. (Voss v. Lake, 1 Cranch C. C. 331; Fed. Cas. No. 17014; Sommerville v. French, 1 Cranch C. C. 474; Fed. Cas. No. 13173.) He is a mere ministerial officer, and it is no part of his duty to apply to the district attorney to issue process. (Levy Court v. Ringgold, 5 Peters, 451.) He or his deputy must serve original process, as it cannot be served by a private person (Schwabacker v. Reilly, 2 Dill. 127; Fed. Cas. No. 12501); and when process is issued by a commissioner, it is his duty to make return thereon (United States v. Scroggins, 3 Woods, 529; Fed. Cas. No. 16244); but a subpoena may be served by a private person. (Russell v. Ashley, Hemp. 546; Fed. Cas. No. 12150; Schwabacker v. Reilly, 2 Dill. 127; Fed. Cas. No. 12501; Scott v. Allen, 6 Phila. 484.) A deputy marshal may make return of process, but should do so in the name of the marshal. (Spafford v. Goodell, 3 McLean, 97; Fed. Cas. No. 13197.) Marshal may amend his return. (Intern. Grain Ceiling Co. v. Dill, 10 Ben. 92; Fed. Cas. No. 7053.) A deputy marshal is an officer for whose appointment, qualification, and removal the laws of the United States expressly provide. (The E. W. Gorgas, 10 Ben. 460; Fed. Cas. No. 4585.)

§ 280. **Powers of marshals.**—The marshals and their deputies shall have in each State the same

powers in executing the laws of the United States as the sheriffs and their deputies in such State may have by law in executing the laws thereof. (Rev. Stats. sec. 788.)

Note.—A marshal may appoint a special bailiff to execute a particular process (U. S. v. Jailer, 2 Abb. U. S. 265; Fed. Cas. No. 15463), and the person appointed by him is an officer de facto. (Hyman v. Chales, 12 Fed. Rep. 855; Hopkins v. Chales, 12 Fed. Rep. 855.) This section differs from earlier statutes only in the substitution of the words "may have" for the word "have." But for the circumstance that the Revised Statutes is declared to be the re-enactment of laws already in force, this change of phraseology might be construed as conferring on marshals such powers as by State law are conferred on sheriffs. (The E. W. Gorgas, 10 Ben. 470; Fed. Cas. No. 4585.) Independently of any rule of court or statute, a marshal or sheriff may direct a particular ministerial act with the performance of which he is charged, to be performed by another acting for him and under his authority and upon his responsibility. (The E. W. Gorgas, 10 Ben. 467; Fed. Cas. No. 4585.) A marshal of the United States has the same power to keep the peace of the United States that a sheriff has to keep the peace of the State, and is authorized to protect a judge from assault and murder. (Cunningham v. Neagle, 135 U. S. 1.) Authority from the attorney general and district attorney of the United States is sufficient to warrant a marshal in making provisions for the protection and defense of a justice of the supreme court while in the discharge of his duty. (Cunningham v. Neagle, 135 U. S. 1.) Under this section a marshal, in executing the laws of the United States, has the same right to arrest without warrant as the sheriffs of the State in which is situated the district

for which the marshal acts. (In re Acker, 66 Fed. Rep. 290.)

§ 281. **Death of marshal.**—In case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specifically removed, and shall execute the same in the name of the deceased until another marshal is appointed, as provided in this chapter, and duly qualified. The defaults or misfeasances in office of such deputies in the meantime shall be adjudged a breach of the condition of the bond given by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputies, during such interval, as he would be entitled to if the marshal had continued in life and in the exercise of his said office until his successor was appointed and duly qualified. (Rev. Stats. sec. 789.)

§ 282. **May execute process in their hands when removed.**—Every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed expires, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office; and the marshal shall be held responsible for the delivery to his successor of all prisoners who may be in his custody at the time of his removal, or when the term for which he is appointed expires; and for that purpose he may retain such prisoners in

his custody until his successor is appointed and duly qualified. (Rev. Stats. sec. 790.)

Note.—The word "execute" in this section includes making return to the process executed. (Cushing v. Laird, 4 Ben. 70; Fed. Cas. No. 3508.) So a marshal may amend his return even after he has ceased to hold office. (Cushing v. Laird, 4 Ben. 70; Fed. Cas. No. 3508.) So execution is not complete until the money is made and paid over to the plaintiff, and all remedies to compel him to pay over the money survive his term of office. (McFarland v. Gwin, 3 How. 717.) If a marshal receives a writ of summons during his term, he may serve it after his successor is qualified. (Stewart v. Hamilton, 4 McLean, 534; Fed. Cas. No. 13429.) So if execution is issued to him, he may make a levy after his removal (Byers v. Fowler, 12 Ark. 218); and if he make a levy prior to removal, he may sell the property after his removal. (Byers v. Fowler, 12 Ark. 218; Doolittle v. Bryan, 14 How. 563; contra, Overton v. Gorham, 2 McLean, 509; Fed. Cas. No. 10626; U. S. v. Bank, Hemp. 460; Fed. Cas. No. 17904; Bowerbank v. Morris, Wall. Sr. 119; Fed. Cas. No. 1726.) If he make a levy after his removal, a sale by his successor is irregular, but valid in a collateral proceeding. (Byers v. Fowler, 12 Ark. 218.) The removal is complete as soon as the new marshal qualifies, even though no notice of the removal is given to the old marshal. (U. S. v. Bank, Hemp. 460; Fed. Cas. No. 17904; Overton v. Gorham, 2 McLean, 509; Fed. Cas. No. 10626; contra, Bowerbank v. Morris, Wall. Sr. 119; Fed. Cas. No. 1726.)

See power to execute in Indian Territory, 25 U. S. Stats. 167.

§ 283. **Oath of clerks.**—The clerk of the supreme court, and every clerk and deputy clerk of

a circuit or district court, shall, before he enters upon the execution of his office, take an oath or affirmation in the following form: "I, A. B., being appointed a clerk of ——, do solemnly swear (or affirm) that I will truly and faithfully enter and record all the orders, decrees, judgments and proceedings of the said court, and that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding. So help me God." The words "so help me God" shall be omitted in all cases where an affirmation is admitted instead of an oath. (Rev. Stats. sec. 794.)

§ 284. **Clerk's bond.**—That the clerks of the supreme court and the circuit and district courts respectively shall each, before he enters upon the execution of his office, give bonds, with sufficient sureties, to be approved by the court for which he is appointed, to the United States, in the sum of not less than five and not more than twenty thousand dollars, to be determined and regulated by the attorney general of the United States, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk; and it shall be the duties of the district attorneys of the United States, upon requirement by the attorney general, to give thirty days' notice of motion in their several courts that new bonds, in accordance with the terms of this act, are required to be executed; and upon failure of any clerk to

execute such new bonds his office shall be deemed vacant. The attorney general may at any time, upon like notice, through the district attorney, require a bond of increased amount, in his discretion, from any of said clerks within the limits of the amount above specified; and the failure of the clerk to execute the same shall in like manner vacate his office. All bonds given by the clerks shall, after approval, be recorded in their respective offices, and copies thereof from the records, certified by the clerks, respectively, under seal of court, shall be competent evidence in any court. The original bond shall be filed in the department of justice. (18 U. S. Stats. 333; 1 Sup. Rev. Stats. 145. See Rev. Stats. sec. 795.)

Note.—The addition "that the clerk shall faithfully account for all moneys," does not vitiate the bond (U. S. v. Ambrose, 2 Fed. Rep. 552); nor does a condition that the clerk shall, by himself or "by his deputies," faithfully perform the duties of his office. (U. S. v. Ambrose, 2 Fed. Rep. 552.) Sureties of a clerk of court cannot escape liability for his failure to account for money paid into court under an order, on the ground that the custody of such money is not a proper part of his duties. (In re Finks, 41 Fed. Rep. 383.)

§ 285. **Increase of bond.**—That whenever the business of the courts in any judicial district shall make it necessary in the opinion of the attorney general, for the clerk or marshal to furnish greater securities than the official bond now required by law, a bond in a sum not to exceed forty thousand dollars shall be given when required by the attor-

ney general, who shall fix the amount thereof. (18 U. S. Stats. 333; 1 Sup. Rev. Stats. 145; Rev. Stats. sec. 795.)

§ 286. **Bond of deputy clerks.**—Any circuit or district court may require any deputy clerk thereof to give bond to the United States for the faithful discharge of his duty as such deputy, in the same penalty, and with surety in the same manner, as is required by law of clerks; and such bond shall be recorded and preserved in like manner, but the taking of such bond shall not affect the legal responsibility of the clerk for the acts of such deputy. (Rev. Stats. sec. 796. See United States v. Ambrose, 2 Fed. Rep. 553.)

§ 287. **List of judgments.**—Every clerk of a circuit or district court shall, within thirty days after the adjournment of each term thereof, forward to the solicitor of the treasury a list of all judgments and decrees, to which the United States are parties, which have been entered in said courts, respectively, during such term, showing the amount adjudged or decreed, in each case, for or against the United States, and the term to which execution thereon will be returnable. (Rev. Stats. sec. 797.)

§ 288. **Account of payments.**—At each regular session of any court of the United States, the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they were deposited, and

in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court. (Rev. Stats. sec. 798.)

§ 289. **Oaths, who may administer.**—The clerks of the district and circuit courts may, in the absence or in case of the disability of the judges, administer oaths to all persons identifying papers found on board of vessels or elsewhere, to be used on trials in admiralty causes. (Rev. Stats. sec. 799.) That United States commissioners and all clerks of United States courts are hereby authorized to administer oaths. (29 U. S. Stats. 184.)

§ 290. **Powers and duties of officers.**—COLORADO AND OTHER STATES.—The marshal, district attorney, and the clerk of the circuit and district courts of said district of Colorado, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powes and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation allowed to other similar officers and persons performing similar duties, by the laws of the United States, excepting such provisions thereof as are specially applicable to some particular officer or district. (19 U. S. Stats. 62, sec. 4.)

CHAPTER XVI.

FEES.

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§ 291. Fees to be taxed.—The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases

otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. (Rev. Stats. sec. 823.)

Note.—An act which went into effect July 1, 1896 (29 U. S. Stats. 179-186), provided that district attorneys should thereafter receive regular salaries as provided therein in lieu of fees; that fees should thereafter be collected and covered into the treasury of the United States. The act was only partially applicable to the southern district of New York, the District of Columbia, and Indian Territory, and did not apply to Alaska. It was provided that the act should not be so construed as to prevent or affect the amount or taxation of costs against the unsuccessful party in civil proceedings or against defendants convicted of crimes or misdemeanors.

Fees—Generally.—This section refers in terms only to compensation, and not expenses and disbursements incurred. (The F. Merwin, 10 Ben. 407; Fed. Cas. No. 4893.) The Federal statutes regulate the matter of fees and costs in the courts of the United States, and the statutes and practice of the State are not binding in matters comprehended by the Federal statute. (O'Neil v. Kansas City etc. R. Co., 31 Fed. Rep. 663.) The cost of printing the record and testimony cannot be taxed, although the matter printed was for the convenience of and was used by both parties in the case, and both united in preparing it. (Lee v. Simpson, 42 Fed. Rep. 434. See United States

v. Sanborn, 135 U. S. 271.) Defendants who are liable under this section for a fee of $20 cannot be held liable for any further fee for plaintiff's solicitor. (Adams v. Kehlor M. Co., 38 Fed. Rep. 281.) This section applies to clerk's compensation in the territory of Utah. (U. S. v. Averill, 130 U. S. 335.)

Fees allowed to officers.—This section prescribes what fees are allowed to the clerk, district attorney and other officers (U. S. v. Cigars, 2 Fed. Rep. 105); and nothing can be taxed as costs for the services of attorneys, solicitors, or proctors, except costs and fees enumerated in the statute (Canter v. Amer. Ins. Co., 3 Peters, 307; The Baltimore, 8 Wall. 377; The Liverpool Packet, 2 Sprague, 37; Fed. Cas. No. 8407; Derry v. Hersey, 21 Law Rep. 473); but the fee-bill does not prevent a court of equity from allowing counsel fees as costs in certain cases (In re Waite, 1 Low. 321; Fed. Cas. No. 7170; Ex parte Plitt, 2 Wall. Jr. 453; Fed. Cas. No. 11228), so, whether counsel fees shall be allowed on a creditor's petition for an adjudication of bankruptcy rests with the court. (In re Williams, 2 Bank Reg. 83; Fed. Cas. No. 17704.) Taxable costs earned by officers are their individual property and not that of the parties to the cause in which they have been earned. (Aiken v. Smith, 13 U. S. App. 394; 57 Fed. Rep. 423.) Costs can be taxed for only two counsel of the same party. (In re Waite, 1 Low. 321; Fed. Cas. No. 7170.) An allowance of a solicitor's fee for an overruled exception to a master's report is not proper. (Garretson v. Clark, 17 Blatchf. 256; Fed. Cas. No. 5249; S. C., 15 Blatchf. 70; Fed. Cas. No. 5248.) District attorneys are recognized only as attorneys, and are compensated as such (The Nassau, Blatchf. Prize, 601; Fed. Cas. No. 10027); and the allowance of costs to them is in the jurisdiction of the judge, and not within the power of the officers

of the treasury. (U. S. v. Ingersoll, Crabbe, 135; Fed. Cas. No. 15440.) Where services were in part performed by one district attorney, and in part by his successor, the fees taxed will be distributed between them. (Ex parte Robbins, 2 Gall. 320; Fed. Cas. No. 11879.) The statute is a positive enactment (The Nassau, Blatchf. Prize, 601; Fed. Cas. No. 10027); and must be rigorously enforced. (Stimpson v. Brooks, 3 Blatchf. 456; Fed. Cas. No. 13454.) The prevailing party is entitled only to such costs as the statute allows (Day v. Woodworth, 13 How. 363; Kneass v. Schuylkill Bank, 4 Wash. C. C. 106; Fed. Cas. No. 7876); and when a charge for services is not found in the schedule of fees it must be rejected (Dedekam v. Vose, 3 Blatchf. 153; Fed. Cas. No. 3731; Lyell v. Miller, 6 McLean, 422; Fed. Cas. No. 8620; U. S. v. Smith, 1 Wood. & M. 184; Fed. Cas. No. 16346; U. S. v. Packages, 18 Law. Rep. 284); but fees may be allowed for matters not therein enumerated. (Jordan v. Agawam Wood Co., 3 Cliff, 239; Fed. Cas. No. 7516.) A court of equity may allow costs not presented in the statute, and such as justice and equity may require. (Spaulding v. Tucker, 2 Sawy. 50; Fed. Cas. No. 13221.)

Costs.—Costs are not payable out of the fund in controversy (National Bank v. Whitney, 103 U. S. 99), but each party is liable to the officer for fees for services performed for him without respect to which recovers judgment (Caldwell v. Jackson, 7 Cranch, 276; In re Stover, 1 Curt. 93; Fed. Cas. No. 13506); and security may be required from a non-resident. (Gross & P. Manuf'g Co. v. Gerhard, 8 Rep. 136; Fed. Cas. No. 5843.) Commissions of the sheriff or marshal on collections, and of the clerk for taking charge of the money are part of the costs of the suit. (Kitchen v. Woodfin, 1 Hughes, 340; Fed. Cas. No. 7855.) A party is not liable for costs for not doing what he was re-

strained by injunction from doing (Kearney v. A Pile Driver, 3 Fed. Rep. 247); but where delay in suing was attributable to concealment in the wrong-doer, costs were alowed. (The Christopher Columbus, 8 Ben. 239; Fed. Cas. No. 2705.) No costs are allowed on dismissing a bill and cross-bill. (Prime v. Brandon Manuf'g Co., 16 Blatch. 453; Fed. Cas. No. 11421.) The allowance or non-allowance of costs in an admiralty cause is a matter of discretion. (Taylor v. Woods, 3 Woods, 146; Fed. Cas. No. 13809; see The Emily B. Souder, 15 Blatchf. 185; Fed. Cas. No. 4458.) The clerk's fee of one dollar with the note of issue, on appeal in admiralty, put upon the calendar, is taxable. (The Alice Tainter, 14 Blatchf. 225; Fed. Cas. No. 196.) Where there are cross-libels in a case of collision, and both vessels were in fault, costs of both courts are equally divided. (Vanderbilt v. Reynolds, 16 Blatchf. 80; Fed. Cas. No. 16839.) The taxation of costs in a cause removed is governed by these sections (Clare v. National City Bank, 14 Blatchf. 445; Fed. Cas. No. 2793; and where a suit is removed it brings along with it the costs as an incident (Warren v. Ives, 1 Flippin, 356; Fed. Cas. No. 17197; Penrose v. Penrose, 1 Fed. Rep. 479; Kreager v. Judd, 5 Fed. Rep. 27; see Gilman v. Libbey, 4 Cliff. 450; Fed. Cas. No. 5445); but the act of Congress prescribing what costs may be taxed applies to such costs as accrue after the removal of the cause. (Warren v. Ives, 1 Flippin, 356; Fed. Cas. No. 17197.)

§ 292. **Attorneys, solicitors, and proctors.**—On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars; *provided*, that in cases of admiralty and maritime jurisdiction, where the libelant recovers less than

fifty dollars, the docket fee of his proctor shall be but ten dollars

In cases at law, when judgment is rendered without jury, ten dollars.

In cases at law, when the cause is discontinued, five dollars.

For *scire facias*, and other proceedings on recognizances, five dollars.

For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents.

For services rendered in cases removed from a district to a circuit court by writ of error or appeal, five dollars.

For examination by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed.

For each day of his necessary atendance in a court of the United States, on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.

For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.

When an indictment for crime is tried before a jury and conviction is had, the district attorney may be allowed, in addition to the attorney's fees

herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars. (Rev. Stats. sec. 824.)

Solicitor's fees.—The solicitor's fee of $2.50 allowed by this section for each deposition taken and admitted in evidence applies only to an attorney or solicitor, and cannot be allowed to a party who is not an attorney, appearing in his own behalf. (Gorse v. Parker, 36 Fed. Rep. 840.) The intervenor in an equity case, who prevails in such intervention, is not entitled to recover the fee. (Central Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. Rep. 684.) It applies only to depositions taken de bene esse, and in other cases not within the ordinary method of taking testimony in causes pending in Federal courts; and it does not apply to depositions taken before any of the regular examining officers of the court. (Tuck v. Olds, 29 Fed. Rep. 883.) It cannot be allowed for depositions taken in another suit, against different defendants, for the infringement of the same patent, brought in another district, and merely admitted in evidence in the case at bar. (Cary v. Lovell Mfg. Co., 39 Fed. Rep. 163.) This section does not apply to testimony taken before a commissioner appointed to make distribution of a fund in the registry of a court of admiralty, arising from the sale of a vessel. (James Dalzell's Son & Co. v. The Daniel Kaine, 31 Fed. Rep. 746. See United States v. Sanborn, 135 U. S. 271.) The rule allowing a reasonable solicitor's fee as costs to be paid out of a fund recovered by one under a bill filed in behalf of himself and other beneficiaries under a trust does not authorize the costs as between solicitor and client to be taxed against the defendants. (Adams v. Kehlor Milling Co., 38 Fed. Rep. 281. See United States v. Sanborn, 135 U. S. 271.)

Docket fee.—On trial or final hearing a docket fee of twenty dollars is taxable. (The Bay City, 3 Fed. Rep. 48.) The solicitor's docket fee is not allowed for a discontinuance, but only for a hearing on the merits. (Kaempfer v. Taylor, 78 Fed. Rep. 795.) The docket fee of twenty dollars is the highest compensation allowed, and it can be allowed but once (Troy I. & N. Factory v. Corning, 7 Blatchf. 16; Fed. Cas. No. 14197; Dedekam v. Vose, 3 Blatchf. 77; Fed. Cas. 3730); but where there were three trials—the first resulting in a verdict for plaintiff, and the other two in separate verdicts for defendant—the defendant's attorney is entitled to a docket fee of twenty dollars for each of the three trials. (Schmieder v. Barney, 7 Fed. Rep. 451.) Where three causes should have been consolidated the court should allow but one docket fee. (The State of Missouri, 46 U. S. App. 245; 76 Fed. Rep. 376.) In a case tried twice by a jury which both times disagreed, and the case was dismissed, a docket fee of only five dollars is taxable. (Strafer v. Carr, 6 Fed. Rep. 466.) A docket fee may be taxed in one of a number of cases embraced by stipulation in a single hearing. (Goodyear D. V. Co. v. Osgood, 13 O. G. 325; Fed. Cas. No. 5594.) It cannot be taxed for an attorney not admitted to the bar of the court, nor one whose name is not on the docket before the filing of the general replication. (Goodyear D. V. Co. v. Osgood, 13 O. G. 325; Fed. Cas. No. 5594.) It is to be taxed in every case where a final decree is entered after replication filed (Goodyear D. V. Co. v. Osgood, 13 O. G. 325; Fed. Cas. No. 5594.) There is no distinction in admiralty between suits in rem and suits in personam. (The Young Mechanic, 3 Ware, 58; Fed. Cas. No. 18182.) In a summary proceeding where the amount is less than $50 and the libelant's proctor takes advantage of a rule of court dispensing with libelant's stipulation for costs, no proctor's fee can be taxed in his favor ex-

cept by special allowance of court. (The Ethel, 59 Fed. Rep. 474.) "Trial" means a trial by jury, and until the jury is sworn there is no trial. (Gordon v. Scott, 2 Bank. Reg. 86; Fed. Cas. No. 5620.) The Bay City, 3 Fed. Rep. 47.) "Trial before a jury" applies only to cases where the controversy is terminated by a verdict and judgment thereon. (Strafer v. Carr, 6 Fed. Rep. 466.) "Final hearing" is the submission of a case in equity for determination. (Goodyear D. V. Co. v. Osgood, 13 O. G. 325; Fed. Cas. No. 5594.) The docket fee may be allowed, although libelants discontinue after a witness has been sworn (The Bay City, 3 Fed. Rep 47); but it is not taxable on a motion for an order by default against stipulators. (Dedekam v. Vose, 3 Blatchf. 153; Fed. Cas. No. 3731.) Where the bill is dismissed with costs without notice to defendants or hearing of the case, the solicitor's fee of twenty dollars will not be allowed. (Coy v. Perkins, 13 Fed. Rep. 111.) The fee is allowed where any issue of law or fact has been presented to the court for consideration, and where the expression of the court's opinion thereon after final hearing results in a final disposition of the cause, even though such disposition be a dismissal on motion of complainant. (Carter v. Sweet, 84 Fed. Rep. 16.) It is only where some question of law or fact involved in or leading to the final disposition of the case has been submitted or presented for consideration that the fee of twenty dollars is warranted, as where the court on motion and argument dismisses an appeal for irregularity. (Coy v. Perkins, 13 Fed. Rep. 111; Hayford v. Griffiths, 3 Blatchf. 79; Fed. Cas. No. 6264.) If parties waive a jury trial, a docket fee of only ten dollars can be taxed. (Jones v. Schell, 8 Blatchf. 79; Fed. Cas. No. 7493.) It is allowable in a Circuit Court when a cause on appeal is on the calendar for hearing, and dismissed for want of security for costs.

(Hayford v. Griffiths, 3 Blatchf. 79; Fed. Cas. No. 6264.) So when there is no denial and no contest, it cannot be allowed. (In re Mead, 8 Phila. 174.) Proceedings before a master upon a reference for an interlocutory purpose is neither a trial nor a final hearing, and the docket fee cannot be allowed therefor (Doughty v. Manuf. Co., 8 Blatchf. 107; Fed. Cas. No. 4030; The Mount Eden, 87 Fed. Rep. 483); nor can a docket fee be allowed upon exceptions to a commissioner's report. (Beckwith v. Easton, 4 Ben. 357; Fed. Cas. No. 1212.) Defendant in a suit in equity dismissed for want of prosecution is not entitled to a docket fee of twenty dollars. (Wigton v. Brainerd, 24 Blatchf. 18; Ryan v. Gould, 32 Fed. Rep. 754; Central Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. Rep. 684.) A special master in chancery is not a referee, within the meaning of this section providing a docket fee of twenty dollars in certain cases. (Central Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. Rep. 684.) Such fee is always taxed in a law case, where there is a final trial before a jury. The court determines who is the prevailing party. (Williams v. Morrison, 32 Fed. Rep. 682.) A proctor representing more than one libelant on final hearing, though under independent libels. (The Mount Eden, 87 Fed. Rep. 483; Black Diamond Coal Co. v. The H. C. Grady, 84 Fed. Rep. 226.) Where a vessel is libeled by material men, and thereafter other material men file libels in the nature of interventions to be perfected if the vessel is released, otherwise to operate on the balance of the proceeds of the sale, proctor's costs should not be allowed on such subsequent suits. (The Julia, 57 Fed. Rep. 233.)

Depositions.—The attorney of the prevailing party is entitled to the pay of two dollars and a half for each deposition admitted in evidence, when it is agreed that they may be read on the trial (Jerman v.

Stewart, 12 Fed. Rep. 271), although the witness attended and was sworn and examined (Beckwith v. Easton, 4 Ben. 357; Fed. Cas. No. 1212); but if the depositions taken and used in the district court are read from the apostils of the circuit court, no fee is taxable in the circuit court. (Dedekam v. Vose, 3 Blatchf. 77; Fed. Cas. No. 3730.) The depositions must be admitted in evidence in that cause or no fee will be allowed, even though the court by order provides for their use in a future suit (Kaempfer v. Taylor, 78 Fed. Rep. 795); but if taken for use on a motion for a preliminary injunction and not used until final hearing under stipulation, a fee should be allowed. (Indianapolis Water Co. v. American Straw-Board Co., 65 Fed. Rep. 534.) The cost of taking a deposition be bene esse may be taxed (Fry v. Yeaton, 1 Cranch C. C. 550; Fed. Cas. No. 5142); but if the party dispenses with the deposition and examines the witness, the costs of the deposition cannot be taxed (Hathaway v. Roach, 2 Wood. & M. 63; Fed. Cas. No. 6213; Pinson v. Atchison T. & S. Fe R. Co., 54 Fed. Rep. 464); nor will the fees of illegible depositions be allowed. (The Avid, 3 Ben. 434; Fed. Cas. No. 678.) The fee for depositions relates to testimony taken out of court under such authority as will entitle it to be read as evidence in court at the trial or hearing. (Troy I. & N. Factory v. Corning, 7 Blatchf. 16; Fed. Cas. No. 14197.) Courts of the United States will allow the same fees to any one taking a deposition as is allowed by the Revised Statutes to clerks of courts and commissioners (Jerman v. Stewart, 12 Fed. Rep. 271); but a fee for an ex parte affidavit in a proceeding for a preliminary injunction is not allowable. (Stimpson v. Brooks, 3 Blatchf. 456; Fed. Cas. No. 13454.) The expenses of counsel while traveling to a distant city to take a deposition are not taxable. (The William Branfoot, 8 U. S. App. 129; 52 Fed. Rep.

390.) A party is entitled to tax costs for any deposition taken in the cause, and to which no exception is made, though it is not read or offered in evidence at the trial. (Sloss Iron & Steel Co. v. South Car. R. Co., 75 Fed. Rep. 106.) The costs of depositions of witnesses taken in good faith and offered in evidence but not used because of the production of the witnesses by order of the court may be taxed in the bill of costs. (Nead v. Millersburg Home Water Co., 79 Fed. Rep. 129.)

Expenses—Allowance.—The statute does not prohibit the allowance of such disbursements as are rendered necessary by the order of the court. (Dennis v. Eddy, 12 Blatchf. 195; Fed. Cas. No. 3793.) So if the rule of court requires papers or briefs to be printed, their expenses may be taxed as costs. (Neff v. Pennoyer, 3 Sawyer, 335; Fed. Cas. No. 10084; Dennis v. Eddy, 12 Blatchf. 195; Fed. Cas. No. 3793; Brooks v. Byam, 2 Story, 553; Fed. Cas. No. 1949.) So the cost of printing the record on appeal to the Supreme Court (Railroad Co. v. The Collector, 96 U. S. 594), or the record preparatory to a final hearing, may be taxed (Jordan v. Agawam Wool Co., 3 Cliff. 239; Fed. Cas. No. 7516); but the expense of printing testimony (Hussey v. Bradley, 5 Blatchf. 134, Fed. Cas. No. 6946, Troy I. & N. Factory v. Corning, 7 Blatchf. 16, Fed. Cas. No. 14197, Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 13221), or a statement of the case for the use of the judges, cannot be taxed as costs. (The Perseverance, 3 Dall. 336.) The cost of copies of assignments appropriate to the case may be taxed (Hathaway v. Roach, 2 Wood. & M. 63, Fed. Cas. No. 6213), and the amount paid for telegraphic dispatches in the suit is allowable, where by affidavit it is shown to have been properly and necessarily expended (Hussey v. Bradley, 5 Blatchf. 210; Fed. Cas. No. 6946 a);

so postage paid on the transmission and return of a commission may be allowed. (Prouty v. Draper, 2 Story, 199; Fed. Cas. No. 11447.) The expense of a survey may be charged against both parties in equal shares. (Whipple v. Cumberland C. Co., 3 Story, 84; Fed. Cas. No. 17515.) The expenses of such models as are copies of models in the patent office is allowable (Hussey v. Bradley, 5 Blatchf. 211, Fed. Cas. No. 6946 a), and their actual value is taxable (Hathaway v. Roach, 2 Wood & M. 63; Fed. Cas. No. 6213); but not the expense of procuring other models. (Hussey v. Bradley, 5 Blatchf. 210; Fed. Cas. No. 6946 a; Woodruff v. Barney, 1 Bond. 528; Fed. Cas. No. 17986; Hathaway v. Roach, 2 Wood & M. 63; Fed. Cas. No. 6213.) So the expense of the model of the infringing machine is not allowable (Parker v. Bigler, 1 Fish. Pat. Cas. 285; Fed. Cas. No. 10726); nor is defendant entitled to the cost of procuring a copy of plaintiff's patent. (Hathaway v. Roach, 2 Wood & M. 63; Fed. Cas. No. 6213; Woodruff v. Barney, 1 Bond. 528; Fed. Cas. No. 17986.) Expenditures for copies of pleadings and proofs are not taxable; and in the absence of an agreement to that effect, the expense of reporting argument of plaintiff's counsel on final hearing (Hussey v. Bradley, 5 Blatchf. 210, Fed. Cas. No. 6946 a); or the expense of a stenographic reporter, is not taxable as costs. (Bridges v. Sheldon, 18 Blatchf. 507.) This section does not apply to costs for travel and attendance; these are allowed by rule of court. (Nichols v. Brunswick, 3 Cliff. 88; Fed. Cas. No. 10239; Whipple v. Cumberland Coal Co., 3 Story, 84; Fed. Cas. No. 17515; Hathaway v. Roach, 2 Wood & M. 63; Fed. Cas. No. 6213. See Sebring v. Ward, 4 Wash. C. C. 546; Fed. Cas. No. 12598; United States v. Sanborn, 135 U. S. 271.)

§ 293. **Fees in revenue cases.**—There shall be taxed and paid to every district attorney two per

centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding. (Rev. Stats. sec. 825.)

Note.—This section applies to cases arising under the internal revenue laws. (U. S. v. Barrels, 2 Bond, 7; Fed. Cas. No. 15115.) It applies to cases where the money is collected or realized. (King v. U. S. 99 U. S. 229.) Its provisions are not affected by the act of June 22, 1874. (18 U. S. Stats. 186: U. S. v. One Horse, 7 Ben. 405; Fed. Cas. No. 15932.) The terms "collected" and "realized" are synonymous. (The Pacific, Deady, 192; Fed. Cas. No. 10645.) This section establishes a rule of compensation as to the government attorney (King v. U. S., 99 U. S. 229), who is entitled to two per cent on the amount received (U. S. v. Barrels, 2 Bond, 7, Fed. Cas. No. 15115), unless the claimant procures a remission of the forfeiture. (The Pacific, Deady, 192; Fed. Cas. No. 10645.) The per centum is in the nature of a contingent upon the collection of the money. (The Pacific, Deady, 192; Fed. Cas. No. 10645.) In case of a discovery of fraud in another district, he is entitled to percentage only on the proportionate amount received on the seizure in his district. (U. S. v. Barrels, 2 Bond, 7; Fed. Cas. No. 15115.) In case of a compromise, the taxation may be made after the case is dismissed. (U. S. v. Barrels, 2 Bond, 7; Fed. Cas. No. 15115.) In revenue cases the district attorney, clerk, and marshal may retain their fees out of the moneys collected. (U. S. v. Cigars, 2 Fed. Rep. 494. See United States v. Sanborn, 135 U. S. 271.)

§ 294. **Fees on bonds, when not allowed.**—No fee shall accrue to any district attorney on any

bond left with him for collection, or in a suit commenced on any bond for the renewal of which provision is made by law, unless the party neglects to apply for such renewal for more than twenty days after the maturity of the bond. (Rev. Stats. sec. 826.)

Note.—See United States v. Sanborn, 135 U. S. 271.

§ 295. **Fees for defense of revenue officers.**—When a district attorney appears by direction of the secretary or solicitor of the treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought and approved by the secretary of the treasury. [See sec. 4646.] (Rev. Stats. sec. 827.)

Note.—The attorney should be allowed such compensation as should be certified by the court to be reasonable and proper, and approved by the secretary of the treasury. (White v. Arthur, 10 Fed. Rep. 87.) The words "officer of the revenue" mean an officer of the revenue from customs. (Campbell v. James, 18 Blatchf. 196; see Campbell v. James, 3 Fed. Rep. 515; United States v. Sanborn, 135 U. S. 271.)

§ 296. **Clerk's fees.**—For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except a writ of venire, or a summons or subpoena for witness, one dollar.

For issuing a writ of summons or subpoena, twenty-five cents.

For filing and entering every declaration, plea, or other paper, ten cents.

For administering an oath or affirmation, except to a juror, ten cents.

For taking an acknowledgment, twenty-five cents.

For taking and certifying depositions to file, twenty cents for each folio of one hundred words.

For a copy of such deposition furnished to a party on request, ten cents a folio.

For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return or report, for each folio, fifteen cents.

For a copy of any entry or record, or of any paper on file, for each folio, ten cents.

For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars.

For making dockets and indexes, taxing costs, and all other services, in a cause where issue is joined, but no testimony is given, two dollars.

For making dockets and indexes, taxing costs, and other services, in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar.

For making dockets and taxing costs, in cases removed by writ of error or appeal, one dollar.

For affixing the seal of the court to any instrument, when required, twenty cents.

For every search for any particular mortgage, judgment or other lien, fifteen cents.

For searching the records of the court for judgments, decrees, or other instrumentsconstituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.

For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid.

For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents for returning, and five dollars a day for his attendance on the court while actually in session.

All books in the offices of the clerks of the circuit and district courts, containing the docket or minute of the judgments, or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor. (Rev. Stats. sec. 828.)

Clerks' fees.—The clerk is entitled to commissions on the proceeds of fines, penalties, or forfeitures under the revenue laws (United States v. One Horse, 7 Ben. 405; Fed. Cas. No. 15932); or on money paid from proceeds of sale by the marshal (Ex parte Prescott, 2 Gall. 146; Fed. Cas. No. 11388; The Avery, 2 Gall. 308; Fed. Cas. No. 671; Clerks' Fees, Taney, 453; Fed. Cas. No. 472); or on money received on execution (Kitchen v. Woodfin, 1 Hughes, 340; Fed. Cas.

No. 7855;) but if he receives money under an execution, he must look to defendant for his commissions. (In re Goodrich, 4 Dill. 230; Fed. Cas. No. 5541; Upton v. Tribilcock, 4 Dill. 230; Fed. Cas. No. 5541 note.) He is not entitled to commissions on money held by an assignee in bankruptcy (Leech v. Kay, 4 Fed. Rep. 72); and although a fund is subject to a decree of court, he is not entitled to a commission unless it is paid in (Ex parte Plitt, 2 Wall. Jr. 453; Fed. Cas. No. 11228); but commissions cannot be claimed unless the money passes through his hands. (Leech v. Kay, 4 Fed. Rep. 72; Northwestern Mut. Life Ins. Co. v. Quinn, 69 Fed. Rep. 462.) The clerk cannot charge commissions when there is no statute requiring the assignee in bankruptcy to pay the proceeds of sale of real estate into the registry. (Leech v. Kay, 4 Fed. Rep. 72.) He is entitled to a fee of fifteen cents for filing a requisition for search for judgments, etc. (In re Woodbury, 7 Fed. Rep. 705; S. C., 17 Blatchf. 517), and fifteen cents for each folio of the certificate (In re Woodbury, 7 Fed. Rep. 705), and twenty cents for affixing the seal of the court to the certificate; but only if required to do so. (In re Woodbury, 7 Fed. Rep. 705.) When properly filed a fee of ten cents is allowed, and when necessary to enter a note on the calendar of such fact an additional fee of fifteen cents is allowed. (Amy v. Shelby Co., 1 Flippin, 104; Fed. Cas. No. 345.) When the number of words is less than one hundred they are counted a folio. (Amy v. Shelby Co., 1 Flippin, 104; Fed. Cas. No. 345; Cavender v. Cavender, 10 Fed. Rep. 828.) No paper is filed unless it has the proper indorsement of the clerk; merely placing it in the court papers is no "filing." (Amy v. Shelby Co., 1 Flippin, 104; Fed. Cas. No. 345.) Services by the clerk are proper charges against the United States if they are covered by the terms of the fee bill. (In re Clerks'

Charges, 5 Fed. Rep. 440.) Charges for search in bankruptcy cases do not legally come within the terms of the fee bill (In re Clerks' Charges, 5 Fed. Rep. 440); and to a fee of fifteen cents for a certificate of search. (In re Woodbury, 7 Fed. Rep. 705.) Though a citizen has not the right to inspect all the books and papers of a court during office hours, yet he may inspect the dockets or minute entries of judgments and decrees. (In re McLean, 2 Flip. 512; Fed. Cas. No. 8877.) For binding or express charges he is allowed the actual cost. (Cavender v. Cavender, 10 Fed. Rep. 828.) He cannot tax costs for drawing a bond and its approval when drawn by counsel and approved by the court. (Cavender v. Cavender, 10 Fed. Rep. 828.) The clerk is entitled to fees for issuing, entering, and filing returns of four separate commitments when four separate bench warrants are issued for the four defendants. (Fuller v. United States, 58 Fed. Rep. 329.) He is not entitled to any fee for administering oaths to answers of defendants in scire facias cases. (Fuller v. United States, 58 Fed. Rep. 329.) For entering names of jurors with postoffice addresses on slips for the jury box and recording the same in a book kept in his office, the clerk is entitled to charge 15 cents per folio. (Fuller v. United States, 58 Fed. Rep. 329.) He is entitled to fees for copying into the final record in criminal cases all papers which he is required to so record by an order of the court (Fuller v. United States, 58 Fed. Rep. 329); and for filing reports made by the district attorney in regard to officer's accounts and for making entries on the record showing presentation of the accounts in open court. (Van Duzee v. United States, 59 Fed. Rep. 440.) He is entitled to folio fees for making separate record entries of the various steps and proceedings in a criminal case. (Van Duzee v. United States, 59 Fed. Rep. 440.) The clerk may

collect his costs as they accrue, and can charge only ten cents a folio for a transcript of the record. (Cavender v. Cavender, 10 Fed. Rep. 828; see Jerman v. Stewart, 12 Fed. 273; In re U. S. v. Cigars, 2 Fed. Rep. 494.) The fees of the clerk, so far as fixed by statute, are governed by this section. The clerk cannot be called on to render service without compensation, if the case is not within existing provisions. He is in such case entitled to reasonable compensation. (In re Vermeule, 10 Ben. 2; Fed. Cas. No. 16916.) If a tender is first made after suit brought, the clerk's fees of one per cent under this section for receiving, keeping, and paying out the money, must be paid by the party making the tender. (The Serapis, 37 Fed. Rep. 436.) In habeas corpus proceedings, costs are not governed by this section. The court may in its discretion, fix reasonable fees. (Re Moy Chee Kee, 33 Fed. Rep. 377.) This action allows for "filing and entering every declaration, plea or other paper, ten cents." Each deposition is not necessarily a "paper" within the meaning of this clause. (United States v. Barber, 140 U. S. 164; United States v. Van Duzee, 140 U. S. 169.) Where proceedings for removal from a State court are sent up in a transcript they should be entered upon the final record; and the charge of the clerk, of fifteen cents per folio for making the record, is lawful and proper. (Blain v. Home Ins. Co., 30 Fed. Rep. 667.) A clerk may charge for seals upon copies of orders which under the rules require to be sealed, as orders to pay jurors. (Marvin v. United States, 44 Fed. Rep. 405.) But he is not entitled if the order need not be sealed. (Marvin v. United States, 44 Fed. Rep. 405; Jones v. United States, 39 Fed. Rep. 410.) The clerk is entitled to compensation for filing appointments of deputy marshals and recording oaths (United States v. Van Duzee, 140 U. S. 169, 199); for furnishing defendant a copy of the in-

dictment (Id.); for filing processes for bench-warrants (Id.); for any services properly required of him by order of court. (Id.) For making dockets and indexes, he is entitled to the fees prescribed in this section. (Taylor v. United States, 45 Fed. Rep. 531; Van Duzee v. United States, 41 Fed. Rep. 571.) For entering respites of jury, or orders of continuance, or for entering a bail-bond upon the record; for usual captions of records; for taking affidavits of government witnesses; for copies of orders to the marshal to bring prisoners to the court for trial; for certificate of clerk, and for seals of the court to copies of orders directing the marshal to pay jurors, etc.; for authentication of copies of mittimus (Taylor v. United States, 45 Fed. Rep. 531); for filing discharge tickets of the district attorney, a fee of ten cents each. (Id.) For filing commissioners' papers where persons have been examined and held to bail, he is entitled to ten cents for each paper. (Id.) For each person whose acknowledgment is taken, he is entitled to a separate fee of twenty-five cents. (Id.) The allowance in this section of one per cent on the amount received and kept and paid out by him, but not where the debt or claim is settled by the parties without a sale of the property. (Smith v. Morgan City, 39 Fed. Rep. 572.) For incorporating in the final records in a criminal case the order made by the commissioner binding the party to appear before the grand jury, in a district in which it is required that the record shall include such order, a clerk is entitled to fees. (United States v. Van Duzee, 140 U. S. 169, 199.) For copies of subpoenas furnished to a marshal in criminal cases, to be served upon witnesses, a clerk is entitled to fees, where there is a rule of court in the district requiring him to make such copies. (Id.) For filing oaths, bonds, and appointments of deputy marshals, jury commissioners, bailiffs, district attorneys, and their assistants, and for recording them

where it is the practice to require them to be recorded, a clerk is entitled to fees, but not to the expense of taking the oaths and executing the bonds. (Id.) This section allows a clerk, "for taking an acknowledgment, twenty-five cents," but the taking of such acknowledgment in a criminal case by the accused and his sureties is a single act, for which only one fee can be charged. (Churchill v. United States, 25 Ct. Cl. 1; United States v. Ewing, 140 U. S. 142.) The clerk is not entitled to commissions for receiving, keeping, and paying out money, unless it passes through his hands. (Easton v. Houston & T. C. R. Co., 44 Fed. Rep. 718.) For making the brief minute of the date of the case, pages of fee-book and record, on the jacket in which papers of a case are enclosed gives him no right to any special compensation. (Van Duzee v. United States, 41 Fed. Rep. 571.) Judgment records and the indexes and cross-indexes thereto are open to the public, without payment of any fee to the clerk. (Re Chambers, 44 Fed. Rep. 786.) Under this section the clerk of the United States Circuit Court is entitled to $5 for every day the court is in session under Rev. Stat. secs. 2011-2014, providing for the opening of the court not less than ten days prior to registration for election, or prior to the election for a member of Congress, and continuing court until day following the election. (Pleasants v. United States, 35 Fed. Rep. 240.) The clerk is entitled to per diem fees for attendance on the court, not only when the judge is present, but also for those days when in obedience to his order directing its adjournment to a certain day the officers are present upon that day, and the journal is opened by the clerk and the court is adjourned to another day by the further direction of the judge. (United States v. Pitman, 147 U. S. 669.) A clerk is entitled to fees for entering an order of court directing him as to the disposition of money received for fines and for filing certificates of deposit

of fines. (United States v. Kurtz, 164 U. S. 49.) The clerk's right to a docket fee attaches when issue is joined and is not lost by the subsequent withdrawal of the plea which constitutes the issue. (United States v. Kurtz, 164 U. S. 49.) In computing the fees of a clerk in criminal cases the entire record is to be taken as one instrument, and the folios counted continuously from beginning to end. (United States v. Kurtz, 164 U. S. 49.) A clerk is entitled to his per diem when the court is adjourned and opened by the marshal pursuant to the express order of the judge. (Dart's Case, 32 Ct. of Cl. 267.) He is entitled to fees for certificates showing that the duplicate of the marshal's account has been duly filed with the clerk; and to folio fees for making entries showing approval of bail bonds and continuance of trial from day to day, for entering orders of court allowing extra compensation to the district attorney in certain cases, and for making certified copies of these orders, to be attached to the original and duplicate accounts (Van Duzee v. United States, 59 Fed. Rep. 440). He is entitled to fees for making duplicate certified copies of the orders of the court for the payment of jurors and witnesses, and of orders directing the marshal to procure record books needed for the business of the court, but not for affixing the seal to the certificate thereto; he is entitled to fees for filing indictments when returned by the grand jury, and for making a record entry of the presentment and return thereof; and of making reports to the court of the per diem and mileage due to jurors and witnesses; and for furnishing to the marshal two certified copies of the order of the court directing the marshal to furnish meals to jurors in criminal cases, but not for affixing the seal thereto (Van Duzee v. United States, 59 Fed. Rep. 440). A United States district court has power to make an allowance to the clerk of the court for services rendered beyond what are required by law.

Such compensation should be allowed in case of a transfer by him of a large fund from the depository of a court to a trust company (The Advance, 60 Fed. Rep. 422). Clerks are not entitled to fees for filing certificates of discharge of witnesses, nor for filing duplicate abstracts and vouchers, but they are entitled to fees for entering orders of court for the marshal to pay witnesses and jurors, for making certificates to such orders, and for taking and entering of record separate recognizances of witnesses where it is shown that the witnesses could not recognize together without hardship (United States v. Converse, 24 U. S. App. 89; 63 Fed. Rep. 423). He is entitled to charge for both copies of a sentence delivered to a marshal in a criminal case (United States v. Dundy, 40 U. S. App. 375; 76 Fed. Rep. 357). The United States is not liable to the clerk for services performed for a defendant in a criminal case (United States v. Dundy, 40 U. S. App. 375; 76 Fed. Rep. 357). A clerk of the United States district court is not entitled to fees for swearing juries, and except in capital cases is not entitled to fees for making copies of indictments or for affixing his seal thereto (United States v. Dundy, 40 U. S. App. 375; 76 Fed. Rep. 357). He is entitled to fees for filing applications by defendants in criminal cases for orders directing witnesses to be summoned at the cost of the United States and fees for entering orders of court upon such applications (Van Duzee v. United States, 73 Fed. Rep. 794). The clerk is entitled to charge for copies of papers furnished the district attorney for use in preparing cases for trial (Van Duzee v. United States, 73 Fed. Rep. 794). When two or more persons are jointly indicted, tried and convicted, the sentence imposed upon each should be separately entered, and the clerk is entitled to a separate fee for entering each sentence (Van Duzee v. United States, 73 Fed. Rep. 794). The proper docket fee in criminal cases where a plea

of not guilty is first entered, but is subsequently withdrawn and a plea of guilty entered, on which the case is disposed, is one dollar (Van Duzee v. United States, 73 Fed. Rep. 794). The clerk of the circuit court is entitled to a fee of one dollar for issuing each commission to a supervisor of election appointed pursuant to Rev. Stats., secs. 2011, 2012 (United States v. Fitch, 37 U. S. App. 103; 70 Fed. Rep. 578). He is entitled to fees for entering orders of the court approving marshal's accounts; for certifying copies of such orders to be forwarded to the department with accounts, but not for seals affixed to such copies unless the treasury department require the copy of such order to be under seal; for copies of orders for marshals to pay supervisors of election; for filing marshal's accounts of it; for making final records, which also include the order of commitment (United States v. Jones, 147 U. S. 672). The clerk of the circuit court is not entitled to per diem charge for services as clerk in selecting juries in connection with the jury commissioner; nor to a charge for docketing and indexing a summary application to the judge, the proceeding not being a "cause"; nor to charge for making separate reports of the amount of fees due by the United States to jurors and witnesses for traveling and attending, nor for filing separate orders of the court to pay the same; nor for drawing more than one recognizance for witnesses in a criminal case (United States v. King, 147 U. S. 676).

§ 297. **Marshals' fees.**—For service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpoena for a witness, two dollars for each person on whom service is made.

For the keeping of personal property attached on mesne process, such compensation as the court,

on petition setting forth the facts under oath, may allow.

For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each. In States where, by the laws thereof, jurors are drawn by lot, by constables, or other officers of corporate places, the marshal shall receive, for each jury, two dollars for the use of the officers employed in drawing and summoning the jurors and returning each venire, and two dollars for his own services in distributing the venires. But the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service, shall not at any court exceed fifty dollars.

For holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars.

For serving a writ of subpoena on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness.

For serving a writ of possession, partition, execution, or any final process, the same mileage as is allowed for the service of any other writ, and for making the service, seizing or levying on property, advertising and disposing of the same by sale, setoff, or otherwise according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the States, respectively, in which the service is rendered.

For each bail bond, fifty cents.

For summoning appraisers, fifty cents each.

For executing a deed prepared by a party or his attorney, one dollar.

For drawing and executing a deed, five dollars.

For copies of writs or papers furnished at the request of any party, ten cents a folio.

For every proclamation in admiralty, thirty cents.

For serving an attachment *in rem* or a libel in admiralty, two dollars.

For the necessary expenses of keeping boats, vessels or other property attached or libeled in admiralty, not exceeding two dollars and fifty cents a day.

When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars; provided, that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof.

For sale of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying over the money, two and one-half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars.

For disbursing money to jurors and witnesses, and for other expenses, two per centum.

For expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day, in addition to his compensation for services and travel.

For every commitment or discharge of a prisoner, fifty cents.

For transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard; except in the case provided for in the next paragraph.

For transporting criminals convicted of a crime in any district or Territory where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or Territory designated by the attorney general, the reasonable actual expense of transportation of the criminals, the marshal, and the guards, and the necessary subsistence and hire.

For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day.

For attending examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime, and witnesses, two dollars a day; and for each deputy not exceeding two, necessarily attending, two dollars a day.

For traveling from his residence to the place of

holding court, to attend a term thereof, ten cents a mile for going only.

For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit.

In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath, to the satisfaction of the court. (Rev. Stats. sec. 829. See sec. 1660; also 26 U. S. Stats. 839; 1 Sup. Rev. Stats. 909.)

Note.—By an act which went into effect July 1, 1896 (29 U. S. Stats. 179-186), it was provided that marshals should receive annual salaries as provided in the act in lieu of all commissions, fees, etc., but that they should continue to collect the sams fees as formerly and turn them into the hands of the clerk, to be covered into the treasury. The act did not require or authorize the charging of collection

of fees against the United States, except in certain cases for field deputies of the marshal. Expenses of the marshal while traveling on business for the United States are allowed to him (29 U. S. Stats. 179-186). All fees received by the marshal, whether for services rendered to the government or for those rendered to private litigants, are to be turned over to the clerk (United States v. Hillyer, 15 U. S. App. 269; 58 Fed. Rep. 678). The expenses of an outside keeper employed by the marshal to take care of the property attached are not "fees or emoluments" to be accounted for or covered into the treasury (The Vandercook, 77 Fed. Rep. 865). Statutes regulating officers' compensation are to be construed in favor of the United States when the statutes admit of two interpretations (United States v. Clough, 6 U. S. App. 377; 55 Fed. Rep. 373).

Execution of process.—The fees of the marshal on an execution depend upon the law of the State (Alexander v. Thomas, 1 Cranch C. C. 92; Fed. Cas. No. 174; Thomas v. Brent, 1 Cranch C. C. 161; Fed. Cas. No. 13893; Pomroy v. Harter, 1 McLean, 448; Fed. Cas. No. 11263; In re Black, 2 Bank. Reg. 65; Fed. Cas. No. 1458); where execution is extended on land, he is entitled to fees though the land is not sold. (U. S. v. Smith, 1 Wood. & M. 184; Fed. Cas. No. 16346.) The marshal is entitled to the same fees and poundage for serving an execution as are allowed to sheriffs for similar services (U. S. v. Haas, 5 Fed. Rep. 29); but he is not entitled to poundage on property which he does not take into his custody (Ringgold v. Lewis, 3 Cranch C. C. 367; Fed. Cas. No. 11847); nor is he entitled to compensation for its custody. (The Hibernia, 1 Sprague, 78; Fed. Cas. No. 6455.) No allowance beyond two dollars and a half per day can be made as necessary expenses for keeping property (U. S. v. Barrels, 1 Ben. 72; Fed. Cas. No.

16509; The Circassian, 6 Ben. 512; Fed. Cas. No. 2725; The Trial, Blatchf. & H. 94; Fed. Cas. No. 14170; The Free Trader, Brown Adm. 72; Fed. Cas. No. 5091; The Hibernia, 1 Sprague, 78; Fed. Cas. No. 6455; Bottomley v. U. S., 1Story, 153; Fed. Cas. No. 1689); but if the property be removed to a warehouse, such reasonable expense as has been actually paid may be allowed (U. S. v. Barrels, 1 Ben. 72; Fed. Cas. No. 16509), and his claim for compensation must be established by vouchers or otherwise. (The Free Trader, Brown Adm. 72; Fed. Cas. No. 5091; The Phoebe, 1 Ware, 354; Fed. Cas. No. 11065.) He cannot lawfully rent any building except under order of court. (Perrin v. Epping, Chase, Dec. 430; Fed. Cas. No. 10996.) The fee for keeping a vessel on process issued in several cases will be divided equally among all the cases. (The Circassian, 6 Ben. 512; Fed. Cas. No. 2725; The John Walls Jr., 1 Sprague, 178; Fed. Cas. No. 7432.) He may be allowed premiums paid for insurance during the time the property is in his custody. (U. S. v. Barrels, 1 Ben. 72; Fed. Cas. No. 16509.) Where the owners of a seized vessel maintain a man on board for pumping, who is able to do all the work, no charge for pumping can be allowed to the marshal. (The Captain John, 41 Fed. Rep. 347.) Where a small steamer loaded with coal is seized by the marshal for forfeiture, and has neither crew nor engineer nor provisions on board, and there are no extraordinary circumstances apparent, the marshal cannot be allowed more than $2.50 per day for keeping the vessel. (The Captain John, 41 Fed. Rep. 147.)

Serving venire.—Where jurors are drawn by a State officer he is entitled to a fee of two dollars for serving the venire. (U. S. v. Cogswell, 3 Sum. 204; Fed. Cas. No. 14825; U. S. v. Smith, 1 Wood. & M. 184; Fed. Cas. No. 16346.)

Commissions.—The marshal is allowed commissions on all sales made under an interlocutory decree (The Avery, 2 Gall. 308; Fed. Cas. No. 671); so he is entitled to commissions where the property is, by contest, removed into another district and sold. (The San Jose Indiano, 2 Gall. 311; Fed. Cas. No. 12323; see The Russia, 5 Ben. 84; Fed. Cas. No. 12170.) He is entitled to commissions if the case is settled (The City of Washington, 13 Blatchf. 410; Fed. Cas. No. 2772); and although the property is discharged on a stipulation (The City of Washington, 13 Blatchf. 410; Fed. Cas. No. 2772; The Russia, 5 Ben. 84; Fed. Cas. No. 12170); but he is entitled to commissions upon the amount paid in settlement if the case is settled before any claimant appears. (The Scottish Dale, 65 Fed. Rep. 810.) His commissions are estimated upon the sum paid a libelant in settlement of his claim, and not on the amount claimed in the libel. (Robinson v. 15,561 Bags of Sugar, 35 Fed. Rep. 603.) He is entitled to a commission upon the value of a vessel seized by him for violation of law, and released on a remission of the forfeiture by the secretary of the treasury on payment of costs. (The Captain John, 41 Fed. Rep. 147.) When a claim is settled without a sale and the marshal's name nowhere appears in the proceedings, his compensation is not based on any service rendered, but is given to him by way of compensation for loss of the opportunity to earn fees. (Smith v. The Morgan City, 39 Fed. Rep. 572.) Commissions of marshal in State of Washington. (Dexter H. & C. Co. v. Sayward, 79 Fed. Rep. 237.)

Custody of persons.—In case of arrest the marshal is entitled to the expense incurred in employing a deputy (U. S. v. Harker, 3 Sawy. 237; Fed. Cas. No. 15307); and a fee for a commitment when a person is imprisoned under final judgment or order of court. (Ex parte Paris, 3 Wood. & M. 227; Fed. Cas. No.

10714.) If a witness be held in custody he is entitled to a fee on each day that the witness is remanded to jail (Ex parte Paris, 3 Wood & M. 227; Fed. Cas. No. 10714); and a fee for discharge is allowed when the prisoner is set at large. (Ex parte Paris, 3 Wood. & M. 227; Fed. Cas. No. 10714.)

Mileage.—He is entitled to mileage on a return of nulla bona for the distance actually traveled by him or his deputies (Anonymous, Hemp. 450; Fed. Cas. No. 448); but he is not entitled to mileage for serving a venire on a State officer (U. S. v. Smith, 1 Wood & M. 184; Fed. Cas. No. 16346); nor for serving a rule to plead on the defendants. (Parker v. Bigler, 1 Fish. Pat. Cas. 285; Fed. Cas. No. 10726.) If he serves a subpoena out of the State, he cannot charge mileage for more than one hundred miles. (Parker v. Bigler, 1 Fish. Pat. Cas. 285; Fed. Cas. No. 10726.) Expenses necessarily incurred by the marshal are not properly taxable. (The F. Merwin, 10 Ben. 407; Fed. Cas. No. 4893.) Where a vessel seized was released on stipulation for her appraised value, the marshal is entitled to his commissions on such appraised value. (The Acadia, 10 Ben. 482; Fed. Cas. No. 23.) Under this section the marshal is entitled to his commissions when, after seizure, the suit is settled without an order of sale. The commissions to be computed upon the amount paid in settlement. (The Clintonia, 11 Fed. Rep. 740, following The Russia, 5 Ben. 84; Fed. Cas. No. 12170; The City of Washington, 13 Blatchf. 410; Fed. Cas. No. 2772), and denying the Norma, Newb. Adm. 533; Fed. Cas. No. 1626.) Traveling expenses are allowed the marshal while attending court, including the cost of living when the court is held over an intervening day by adjournment. (United States v. Harmon, 147 U. S. 268.) A marshal is not allowed double mileage for serving several writs at the same trip. (Campbell v. United States, 27 U. S. App.

666; 65 Fed. Rep. 777.) A marshal is allowed mileage only on the shortest practicable route by the ordinary mode of travel. (Hitch v. United States, 66 Fed. Rep. 937; Swancoat v. Remsen, 76 Fed. Rep. 950.) A marshal should be allowed mileage for arresting and taking a prisoner before the commissioner issuing the warrant, although there was a nearer officer before whom the prisoner might have been taken, unless such warrant was accompanied by a certified copy of the complaint. (Donahower v. United States, 77 Fed. Rep. 153; 85 Fed. Rep. 547.) Charges for meals and traveling expenses of two deputy marshals for attendance at an examination for the discharge of a poor convict are not allowable unless the charges were necessarily incurred. (Donahower v. United States, 56 U. S. App. 467; 85 Fed. Rep. 545.)

Per diem fees.—Per diem fees are allowable even though no judge is present and no business transacted where the marshal is required to attend. (United States v. Aldrich, 5 U. S. App. 496; 58 Fed. Rep. 688; Kinney v. United States, 60 Fed. Rep. 883.)

§ 298. **Services rendered on account of United States.**—There shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, and in behalf of any prisoner to be tried for a capital offense, for the maintenance of prisoners of the United States confined in jail for any criminal offense; also, for his reasonable actual expense for the tranportation of criminals, and of the marshal and guards, to prisons designated by the attorney general, and for hire and subsistence in that behalf, as hereinbefore provided; also, his fees for the commitment

or discharge of prisoners; his expenses necessarily incurred for fuel, lights, and other contingencies that may accrue in holding the courts within his district, and providing the books necessary to record the proceedings thereof; *provided*, that he shall not incur, or be allowed, an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of a building and making improvements thereon, without first submitting a statement and estimates to the attorney general and getting his instructions in the premises. (Rev. Stats. sec. 830.)

Note.—The marshal is entitled to an allowance for money expended for rent and for clerk hire (U. S. v. Cogswell, 3 Sum. 204; Fed. Cas. No. 14825), and for personal expenses in establishing his account with government (U. S. v. Cogswell, 3 Sum. 204; Fed. Cas. No. 14825), and for maintaining a person committed to his custody, pending trial of the writ of habeas corpus (Case of the Runaways, 4 Cranch C. C. 489; Fed. Cas. No. 12137), and he is entitled to interest on items properly chargeable against government from the time of their rejection (U. S. v. Smith, 1 Wood. & M. 184; Fed. Cas. No. 16346; U. S. v. Cogswell, 3 Sum. 204; Fed. Cas. No. 14825); but he is not entitled to any charge for superintending a State prison where United States prisoners are kept. (U. S. v. Smith, 1 Wood. & M. 184; Fed. Cas. No. 16346.)

Necessary expenses.—Meals furnished to jurors may be charged for when ordered by the court. (Donahower v. United States, 77 Fed. Rep. 153; Campbell v. United States, 27 U. S. App. 666; 65 Fed. Rep. 777.) Fees paid to witnesses for the government, when ordered by the court to be paid, are allowable

to the marshal. (United States v. Hillyer, 15 U. S. App. 269; 58 Fed. Rep. 678.) A marshal should not be allowed fees for unofficial acts which might be performed by a messenger. (Donahower v. United States, 77 Fed. Rep. 153.) A marshal will not be allowed for travel and service of a subpœna on a witness, at a place where there was a deputy to whom the subpœna could have been served. (Donahower v. United States, 77 Fed. Rep. 153.) A marshal is entitled to be reimbursed for money actually paid for guards for prisoners attending court. (Dill v. United States, 78 Fed. Rep. 614.) While transporting prisoners to a penitentiary, involving a trip of thirty-six hours, the marshal is entitled to engage a berth in a sleeping-car, and the cost of the same is chargeable to the United States. (Puleston v. United States, 85 Fed. Rep. 571.) He is entitled, under the act of 1896, to be reimbursed for affidavits to his annual accounts. (Puleston v. United States, 85 Fed. Rep. 571.) Only actual expenses are allowed for transporting a Chinese person to the seaboard. (Jacobus v. United States, 87 Fed. Rep. 99.)

Serving papers.—A marshal is entitled to reasonable compensation for serving a complaint and summons (Swancoat v. Remsen, 76 Fed. Rep. 950).

§ 299. **Attendance on rule days and when circuit and district courts sit at same time.**—No *per diem* or other allowance shall be made to any district attorney, clerk of a circuit court, clerk of a district court, marshal or deputy marshal, for attendance at rule days of a circuit or district court; and when the circuit and district courts sit at the same time, no greater *per diem* or other allowance shall be made to any such officer than for an attendance on one court. (Rev. Stats. sec. 831.)

Note.—No allowance for constructive travel and attendance. (U. S. v. Cogswell, 3 Sum. 204; Fed. Cas. No. 14825.) If the fees of either officer fall below the maximum he is entitled only to that amount, although the fees of the other exceed the maximum. (U. S. v. Bassett, 2 Story, 389; Fed. Cas. No. 14539.)

§ 300. **Marshal of the supreme court of the United States.**—The marshal of the supreme court of the United States shall be entitled to receive for the service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpoena for a witness, one dollar for each person on whom such services may be made. His fees for all other services shall be the same as are herein allowed to other marshals; but he shall pay into the treasury of the United States all fees received by him, and render a true account thereof at the close of each term to the attorney general. (Rev. Stats. sec. 832.)

§ 301. **Sem-annual return of fees.**—Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July in each year, or within thirty days thereafter, make to the attorney-general, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the neeessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such

last half year. He shall state separately in return the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them. (Rev. Stats. sec. 833. See secs. 3085, 4644, 4647.)

Note.—Until the passage of the act of 1898, post, § 302 a, fees charged by the clerk of a district court in naturalization cases were not required to be accounted for under this section (U. S. v. Hill, 120 U. S. 169.) If the fees of either officer fall below the maximum he is entitled only to that amount, although the fees of the other exceed the maximum. (U. S. v. Bassett, 2 Story, 389; Fed. Cas. No. 14539.)

§ 302. **What to be included in the semi-annual returns.**—The preceding section shall not apply to the fees and compensation allowed to district attorneys by sections eight hundred and twenty-five and eight hundred and twenty-seven. All other fees, charges and emoluments to which a district attorney or a marshal may be entitled, by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge there-

of, shall be included in the semi-annual return required of said officers by the preceding section. (Rev. Stats. sec. 834.)

Note.—The term "officer of the revenue" means an officer of the revenue from customs. (Campbell v. James, 18 Blatchf. 196; S. C. 3 Fed. Rep. 515.) His claim for credit for taxable costs not taxed cannot be admitted on a trial unless presented and disallowed. (United States v. Ingersoll, Crabbe, 135; Fed. Cas. No. 15440.)

§ 302 a. **Naturalization fees to be included in clerk's return.**—All clerks of courts of the United States shall pay over, at the times and in the manner provided by law for other fees and emoluments all fees received by them for naturalization, after deducting the amount of compensation they are entitled to receive. (30 U. S. Stats. 317.)

Note.—Prior to the passage of the above act, clerks were not required to include fees charged in naturalization cases (United States v. Hill, 120 U. S. 169).

§ 302 b. **Clerk of supreme court to make return of fees.**—The clerk of the Supreme Court of the United States on the first day of January in each year, or within thirty days thereafter, shall, on a form prescribed by the Attorney-General, make to the Attorney-General a return, under oath, of all fees and costs collected by him in cases disposed of at the preceding term or terms of the court, and of all emoluments hereafter collected by him, and after deducting from such collections his compensation as provided in paragraph nine of the Act of March third, eighteen hundred and

eighty-three (22 Statutes at Large, 603-631), and the incidental expenses of his office, including clerk hire, such expenses to be certified by the chief justice, and audited and allowed by the proper accounting officers of the treasury, shall at the time of making such returns pay any surplus that may remain into the Treasury of the United States. (30 U. S. Stats. 317.)

§ 303. **Fees of marshals and district attorney to be covered into treasury.**—That on and after the first day of July, eighteen hundred and ninety-six, all fees and emoluments authorized by law to be paid to United States district attorneys and United States marshals shall be charged as heretofore and shall be collected as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the Treasury of the United States; and the said officers shall be paid for their official services, which in the case of district attorneys shall include services in the circuit court of appeals of their respective circuits wherever sitting, salaries and compensations hereinafter provided and not otherwise. *Provided*, that this section shall not be construed to require or authorize fees to be charged against or collected from the United States, except as provided by sections eleven and thirteen of this Act relating to field deputies and their payments. (29 U. S. Stats. 179, sec. 6.)

Note.—Prior to July 1, 1896, district attorneys and marshals were each allowed to retain from fees collected a sum not exceeding six thousand dollars

a year. (Rev. Stats., sec. 835.) By the provisions of the act which went into effect on the above named date the district attorneys and marshals were required to turn all fees into the hands of the clerk to be covered into the treasury, and in lieu of such fees and other compensation the district attorneys and marshals were to receive salaries as provided by the act. Certain portions of the act did not apply to the southern district of New York, District of Columbia or Indian Territory, or to the Territory of Alaska (29 U. S. Stats. 179-186).

Expenses of district attorney.—An allowance for travel fees or mileage by the statute to a district attorney was not intended as compensation for his services, but as a re-imbursement for traveling expenses (United States v. Smith, 158 U. S. 346). A district attorney, whose place of abode is at a distance from the place at which court is held, is not entitled to mileage for travel in going to his home every Saturday, and in returning to the place of holding court every Monday morning, during the continuous session of the court (United States v. Shields, 153 U. S. 88). Mileage may be necessary and so properly allowed, though charged for attendance upon successive days before the same commissioner (United States v. Colman, 46 U. S. App. 133; 76 Fed. Rep. 214). The district attorney is allowed the expense of necessary telegraphic communication in regard to criminal business (United States v. Stanton, 35 U. S. App. 799; 70 Fed. Rep. 890). The government is liable for the compensation of a stenographer employed by the district attorney who was authorized by the attorney-general to contract for such employment (United States v. Denison, 80 Fed. Rep. 370).

the secretary of the treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried and disposed of; *provided*, that the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment. (Rev. Stats. sec. 838; 18 U. Stats. 240; 1 Sup. Rev. Stats. 264.)

§ 307. **Compensation retained by a clerk.**—No clerk of a district court, or clerk of a circuit court, shall be allowed by the attorney-general, except as provided in the next section, and in section eight hundred and forty-two, to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year. (Rev. Stats. sec. 839.)

Note.—Where both offices are held by the same person, he is entitled to the distinct compensation provided for each. (United States v. Bassett, 2 Story, 389; Rep. Cas. No. 14539; see In re United States v. Cigars, 2 Fed. Rep. 495.)

§ 308. **Clerks in California, Oregon and Nevada.**—The clerks of the several circuit and dis-

trict courts in California, Oregon and Nevada shall be entitled to charge and receive double the fees hereinbefore allowed to clerks, and shall be allowed, respectively, by the attorney-general, to retain the fees so received by them, for their personal compensation, over and above the necessary expenses of their offices, including the salaries of deputy clerks and necessary clerk hire, to be audited by the proper accounting officers of the treasury department, any sum not exceeding seven thousand dollars a year, nor exceeding that rate for any time less than a year; *provided*, that whenever in either of the said districts, the same person holds the office of clerk of both the circuit and district courts, he shall be allowed by the attorney-general to retain for his personal compensation, as foresaid, only such sum as herein allowed to be retained by a person holding the office of clerk of only one of the said courts. (Rev. Stats. sec. 840.)

§ 309. **Compensation of marshals.**—Prior to July 1, 1896, the several marshals were allowed to retain from the fees collected by them an amount not exceeding six thousand dollars. By an Act which went into effect on that date the marshals were given regular salaries, and the fees thereafter collected were to be covered into the treasury. (29 U. S. Stats. 179-186.)

Note.—The attorney-general can do nothing but reduce the rate allowed, whenever the marshal's return shows such "rate to be unreasonable." (Phillips v. U. S., 11 Ct. of Cl. 570; see preceding section.)

§ 310. **Additional compensation in prize causes.**—Clerks [and marshals] may be allowed to retain, for all official services in prize causes, an additional compensation not exceeding in amount one-half of the maximum compensation allowed to them, respectively, by the three preceding sections. (Rev. Stats. sec. 842.)

See preceding section.

Note.—Clerks and marshals entitled to additional compensation in prize causes. (United States v. Averill, 130 U. S. 335.)

§ 311. **Mileage.**—Only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileages and transportation in excess of the amount actually paid are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision. (June 16, 1874. 18 U. S. Stats. 72; 1 Sup. Rev. Stats. 37. See Rev. Stats. secs. 829, 830.)

§ 312. **Mileage, attorneys, marshals and clerks.**—From and after the first day of January, eighteen hundred and seventy-five, no such officer or person shall become entitled to any allowance for mileage or travel, not actually and necessarily performed under the provisions of existing law. (Sec. 827-839, U. S. Stats. 334; 1 Sup. Rev. Stats. 147.)

Note.—Only one charge for mileage is allowable for the service of several writs on hand at the same

time, in the same direction. (15 Opin, Att.-Gen. 108; see 16 Opin. Att.-Gen. 165.)

§ 313. **Mileage, jurors and witnesses.**—Jurors and witnesses in the district and circuit courts of the United States in and for the State of Colorado shall be entitled to receive fifteen cents for each mile actually traveled in coming to or returning from said courts. (Approved, June 16, 1880. See Rev. Stats. secs. 848-852.)

§ 314. **Allowances for each year made from the fees thereof.**—The allowances for personal compensation of district attorneys, clerks, and marshals, for each calendar year, shall be made from the fees and emoluments of that year, and not otherwise. (Rev. Stats. sec. 843.)

Note.—Since July 1, 1896, the several marshals and district attorneys, excepting the district attorneys in the southern district of New York and certain territories, have been paid annual salaries. (29 U. S. Stats. 179-186.)

§ 315. **Payment of surplus fees into treasury.**—Every district attorney, clerk, and marshal shall, at the time of making his half-yearly return to the attorney-general, pay into the treasury, or deposit to the credit of the treasury, as he may be directed by the attorney-general, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowance authorized by law to be retained by him. (Rev. Stats. sec. 844.)

Note.—See the act of 1896 (29 U. S. Stats., 179-183) which provides that all the district attorneys of the United States, except in the southern district of New York and the district of Columbia, Alaska, and Indian Territory, and all the marshals except in Indian Territory and Alaska, shall turn their fees collected to the clerk, to be by him covered into the treasury of the United States. The act provides for salaries for the several district attorneys and marshals. The department will see that no more is retained by the officer than the sum given him by law. (The Anna, Blatchf. Prize, 337; Fed. Cas. No. 402.) The costs must be taxed according to law. (The Anna, Blatchf. Prize, 337; Fed. Cas. No. 402.) This section is not a "revenue law" within the meaning of section 699, subdivision 2. (United States v. Hill, 123 U. S. 681.)

§ 316. **Auditing of accounts of district attorney.**—In every case where the return of a district attorney, clerk or marshal shows that a surplus may exist, the attorney-general shall cause such return to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officer of his department, and an account to be opened with such officer in proper books to be provided for that purpose. (Rev. Stats. sec. 845.)

§ 317. **Attorney in District of Columbia.**—That the emolument returns of the attorney of the United States for the District of Columbia shall be returned to the attorney-general, and the accounts of the said attorney shall be rendered, audited, and paid in the same manner as accounts of all other district attorneys are rendered, audited

and paid. (Approved, December 14, 1877; 20 U. S. Stats. 7; Sup. Rev. Stats. 303. See Rev. Stats. secs. 833, 834, 844, 846.)

§ 318. Accounts to be certified to by district judge.—The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the treasury department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts; *provided*, that no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs. That where the ministerial officers of the United States have or shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof under the special taxation of the district or circuit court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary. (Rev. Stats. sec. 846; 18 U. S. Stats. 318; 1 Sup. Rev. Stats. 138.)

Note.—The accounts of the marshals and district attorneys and assistants may be submitted to and examined by either the circuit or district judge. (29 U. S. Stats. 183.)

A district judge has the power to take the oath of the clerk to his return of fees of office (United States v. Ambrose, 2 Fed. Rep. 556); and the certificate of the judge is only evidence of the claim or right to be given to the treasury. (United States v. Ingersoll, Crabbe, 135; Fed. Cas. No. 15440.) It is merely prima facie evidence of its correctness, and any item may be rejected by the accounting officers. (United States v. Smith, 1 Wood & M. 184; Fed. Cas. No. 16346.) If the items have been passed upon in judgments as to bills of costs, the certificate of the judge is conclusive. (United States v. Smith, 1 Wood & M. 184; Fed. Cas. No. 16346.) Whether the marshal's fees are fixed by rule or depend on circumstances, they must be certified to. (The Antelope, 12 Wheat. 546.) A refusal by the court to act upon a claim under this section is not required to authorize a presentation of the claim to the treasury department before bringing suit in the court of claims. (United States v. Knox, 128 U. S. 230.) This section declares that clerks, marshals and commissioners of circuit courts shall be accounting officers of the treasury department and shall be subject to revision upon their merits by said accounting officers, as in case of other public accounts. The claimant has a remedy in the court of claims without first resorting to a writ of mandamus against the circuit court. (United States v. Knox, 128 U. S. 230.) It is not a defense to an action by a clerk of the Federal court against the government, to recover his fees, that his claim has not been audited by the officials of the executive department, or that it has not been allowed by such officials. (U. S. v. Fitch, 37 U. S. App. 103; 70 Fed. Rep. 578.)

§ 319. Accounts for costs of clerks, etc.—That before any bill of cost shall be taxed by any judge

or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the treasury, in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court by his own oath or that of other persons having knowledge of the fact, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law, and just. United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. Accounts and vouchers of clerks, marshals, and district attorneys shall be made in duplicate, to be marked respectively "original" and "duplicate." And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all

times. Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the treasury, as exercised under the laws now in force. (See secs. 824, 828; 18 U. S. Stats. 333. 1 Sup. Rev. Stats. 145.)

§ 320. **Clerk failing to report to be removed.**— That if any clerk of any district or circuit court of the United States shall willfully refuse or neglect to make any report, certificate, statement or other document required by law to be by him made, or shall willfully refuse or neglect to forward any such report, certificate, statement or document to the department, officer, or person to whom, by law, the same should be forwarded, the President of the United States is empowered, and it is hereby made his duty, in every such case, to remove such clerk so offending from office, by an order in writing for that purpose. And upon the presentation of such order, or a copy thereof, authenticated by the attorney-general of the United States, to the judge of the court whereof such offender is clerk, such clerk shall thereupon be deemed to be out of office, and shall not exercise the functions thereof. And such district judge, in the case of the clerk of a district court, shall appoint a successor; and in the case of the clerk of a circuit court, the circuit judge shall appoint a successor. And such person so removed shall not be eligible to any appointment as clerk or deputy clerk for the period of two years next after such

removal. [See secs. 797, 798.] (18 U. S. Stats. 333; 1 Sup. Rev. Stats. 146.)

§ 321. **Additional punishment.**—That if any clerk mentioned in the preceding section shall willfully refuse or neglect to make or to forward any such report, certificate, statement, or document therein mentioned, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, in the discretion of the court; but a conviction under this section shall not be necessary as a condition precedent to the removal from office provided for in this act. [See sec. 797.] (18 U. S. Stats. 333; 1 Sup. Rev. Stats. 147.)

§ 322. **Fees of United States commissioners.**—That each United States commissioner shall be entitled to the following named fees, and none other: drawing a complaint, with oath and jurat to same, fifty cents; copy of complaint, with certificate to same, thirty cents; issuing warrant of arrest, seventy-five cents: issuing a commitment and making copy of same, one dollar; entering a return, fifteen cents; issuing subpoena or subpoenas in any one case, with five cents for each necessary witness in addition to the first, twenty-five cents; drawing a bond of defendant and sureties, taking acknowledgment of same and justification of sureties, seventy-five cents; for administering an oath (except to witness as to attendance and travel) ten cents; recognizance of all witnesses in a case,

when the defendant or defendants are held for court, fifty cents; transcripts of proceedings, when required by order of court and transmission of original papers to court, sixty cents; copy of warrant of arrest, with certificate to same, when defendant is held for court, and the original papers are not sent to court, forty cents; order in duplicate to pay all witnesses in a case: For first witness, thirty cents, and for each additional witness five cents, and for oath to each witness as to attendance and travel, five cents; for hearing and deciding on criminal charges and reducing the testimony to writing when required by law or order of court, five dollars a day for the time necessarily employed: *provided*, that not more than one *per diem* shall be allowed in a case, unless the account shall show that the hearing could not be completed in one day, when one additional *per diem* may be especially approved and allowed by the court; *provided*, further, that not more than one *per diem* shall be allowed for any one day; *provided*, further, that no *per diem* shall be allowed for taking a bond or recognizance and passing on the sufficiency of the bond or recognizance and the sureties thereon when the bond or recognizance was taken after the defendant had been committed to prison upon a final commitment, or has given bond or been recognized for his appearance at court, or when the defendant has been arrested on a capias or bench warrant, or was in custody under any process or order of a court of record. For the examination and certificate in

cases of application for discharge of poor convicts imprisoned for nonpayment of fine or fine and costs, and all services connected therewith, three dollars; for attending to a reference in a litigated matter, in a civil cause at law, in equity, or in admiralty, in pursuance of an order of the court, three dollars a day; for taking and certifying depositions to file in civil cases, ten cents for each folio; for each copy of the same furnished to a party on request, ten cents for each folio; for issuing any warrant under the tenth article of the treaty of August ninth, eighteen hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any parties charged with any crime or offense set forth in said article, two dollars; for issuing any warrant under the provision of the convention for the surrender of criminals between the United States and the King of the French, concluded at Washington, November ninth, eighteen hundred and forty-three, two dollars; for hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of said treaty or of said convention, five dollars a day for the time necessarily employed. (29 U. S. Stats. 184.)

United States commissioners.—By an act passed May 28, 1896 (29 U. S. Stats. 184), the office of circuit court commissioner was abolished, and instead the office of district court commissioner was created. A new schedule of fees to be charged by the district court commissioner as given in the above section was established by the act.

Commissioner's fees.—It is important that a commissioner should write out the testimony taken before him in preliminary examinations and he is entitled to fees therefor as an examining magistrate. (United States v. Dundy, 40 U. S. App. 379; 76 Fed. Rep. 355.) Commissioners are not allowed double fees in Wyoming. (Churchill v. United States, 32 U. S. App. 196; 67 Fed. Rep. 529.) The compensation of a commissioner is limited to those specific services for which Congress has provided compensation. (United States v. Patterson, 150 U. S. 65.) Commissioners are subject, so far as relates to their administrative action, to the orders and directions of the court appointing them. (United States v. Allred, 155 U. S. 591.) A lack of good faith on the part of a commissioner will bar his claim against the United States for compensation. (Southworth v. United States, 161 U. S. 639.)

§ 323. **Witnesses' fees.**—For each day's attendance in court, or before any officer, pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpœnaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the *per diem* attendance fee alone shall be taxed in the other cases in the order in which they are disposed of. When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day. (Rev. Stats. sec. 848. See secs. 879-881.)

Witness fees.—A witness subpoenaed at the place of trial on the day of trial is not entitled to a travel fee (The Sunnyside, 5 Ben. 162; Fed. Cas. No. 13619); and if he has the means to pay traveling expenses, it is not necessary to tender his fees. (United States v. Durling, 4 Biss. 509; Fed. Cas. No. 15010.) Fees for attendance may be taxed in civil as well as criminal cases (Sebring v. Ward, 4 Wash. C. C. 546; Fed. Cas. No. 12598); and although he was summoned to serve as a juror and so served (Edwards v. Bond, 5 McLean, 300; Fed. Cas. No. 4294); and where his attendance and examination were procured in good faith, he is entitled to his fees although he was not served with a subpoena. (Pinson v. Atchison T. & S. Fe R. Co., 54 Fed. Rep. 464; Simpkins v. Atchison T. & S. Fe R. Co., 61 Fed. Rep. 999; Sloss Iron & Steel Co. v. South Carolina & G. R. Co., 75 Fed. Rep. 106; but see Lilienthal v. Southern Cal. Ry. Co., 61 Fed. Rep. 622; United States v. Williams, 1 Cranch C. C. 178; Fed. Cas. No. 16709; Power v. Semmes, 1 Cranch C. C. 247; Fed. Cas. No. 11360; Cummings v. The Arkon Co., 6 Blatchf. 509; Fed. Cas. No. 3473; Dennis v. Eddy, 12 Blatchf. 195; Fed. Cas. No. 3793; Anderson v. Moe. 1 Abb. U. S. 299; Fed. Cas. No. 359; Prouty v. Draper, 2 Story, 199; Fed. Cas. No. 11447. But see Sawyer v. Aultman Co., 5 Biss. 165; Fed. Cas. No. 12397; Woodruff v. Barney, 1 Bond, 528; Fed. Cas. No. 17986.) Where persons are subpoenaed as witnesses, but are not introduced to testify, the presumption is that they were unnecessarily brought to court, and their fees are not taxable against the opposite party. (Simpkins v. Atchison T. & S. Fe R. Co., 61 Fed. Rep. 999.) The United States is not required to tender witness fees in advance. (In re Storror, 63 Fed. Rep. 564.) The compensation of experts called by a party in his own behalf cannot be taxed against the losing party.

(The William Branfoot, 8 U. S. App. 129; 52 Fed. Rep. 390.)

Witnesses from a distance.—The attendance of witnesses coming from more than one hundred miles distance is voluntary, even where served with a subpoena (Spaulding v. Tucker, 2 Sawy. 50; Fed. Cas. No. 13221); and fees may be taxed (Dreskill v. Parish, 5 McLean, 241; Fed. Cas. No. 4076), and his traveling fees may be taxed for a distance of one hundred miles and no more (Beckwith v. Easton, 4 Ben. 357; Fed. Cas. No. 1212; The Leo, 5 Ben. 486; Fed. Cas. No. 8252; Anonymous, 5 Blatchf. 134; Fed. Cas. No. 432; Russell v. Ashley, Hemp. 546; Fed. Cas. No. 12150; Pinson v. Atchison T. & S. Fe R. Co., 54 Fed. Rep. 464; Sloss Iron & Steel Co. v. South Car. & G. R. Co. 75 Fed. Rep. 106; but see Hunter v. Russell, 59 Fed. Rep. 964); and if he actually attends his fees may be taxed, although he is not examined (Hathaway v. Roach, 2 Wood & M. 63; Fed. Cas. No. 6213); and although the subpoena was served on him by a private person. (Power v. Semmes, 1 Cranch C. C. 247; Fed. Cas. No. 11360; Gordon v. Scott, 2 Bank Reg. 86; Fed. Cas. No. 5620.) His fees are taxable, although his deposition was taken (Anderson v. Moe, 1 Abb. U. S. 299; Fed. Cas. No. 359; Beckwith v. Easton, 4 Ben. 357; Fed. Cas. No. 1212); and in case of postponement on account of sickness of counsel, the fees may be taxed during the postponement. (Whipple v. Cumberland Cotton Co., 3 Story, 84; Fed. Cas. No. 17515.) Postponement at the request of a party where witnesses of his adversary were present will entitle the latter to costs of the delay. (Hunter v. Russell, 59 Fed. Rep. 964.) The fees may be taxed during their actual attendance, after their examination is closed and while the case is under argument. (Whipple v. Cumberland Cotton Co., 3 Story, 84; Fed. Cas. No. 17515.) If the case is

postponed by agreement fees for double travel may be taxed, if governed by the agreement. (Hance v. McCormick, 1 Cranch C. C. 522; Fed. Cas. No. 6009; Hathaway v. Roach, 2 Wood & M. 63; Fed. Cas. No. 6213.) When summoned in several cases a witness is allowed a per diem and mileage only in one case, to be distributed and charged equally among the various cases (Parker v. Cartzler, 5 McLean, 4; Fed. Cas. No. 10730); but he has a right to fees in each suit where the parties are different. (Parker v. Bigler, 1 Fish. Pat. Cas. 285; Fed. Cas. No. 10726.) A party called and examined as a witness in his own behalf is not entitled to fees and traveling expenses. (Nichols v. Brunswick, 3 Cliff. 88; Fed. Cas. No. 10239; Roundtree v. Rembert, 71 Fed. Rep. 255.) A party is not entitled to costs of more than three witnesses to any one fact. (Bussard v. Catalino, 2 Cranch C. C. 421; Fed. Cas. No. 2228.) Witnesses attending Federal courts are not entitled to the per diem fee of $1.50 in addition to their mileage for time spent in coming to and returning from the place of trial, or for time occupied previous to the day of trial in conference with counsel or proctor. (The Michigan, 52 Fed. Rep. 509; Carter v. Sweet, 84 Fed. Rep. 17.)

Attendance before commissioners.—"Pursuant to law" applies to attendance of witnesses before commissioners only (Cummings v. Akron Co., 6 Blatchf. 509; Fed. Cas. 3473); and if parties agree that the testimony of various witnesses shall be taken before a commissioner in another State, the fees may be allowed, although they attended voluntarily. (Spaulding v. Tucker, 2 Sawy. 50; Fed. Cas. No. 13221.) No per diem allowance can be taxed for attendance before a master where the testimony is afterward abandoned, stricken out or rejected. (Troy etc. Factory v. Corning, 7 Blatchf. 16; Fed. Cas. No. 14197.)

Detention of witness.—If a witness is committed for want of recognizance, he is entitled to fees for the time he is detained. (In re Higginson, 1 Cranch C. C. 73; Fed. Cas. No. 6471.)

§ 324. **No officer of court to have witness fees.**—No officer of the United States courts, in any State or Territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating. (Rev. Stats. sec. 849.)

§ 325. **Expenses of clerks as witnesses.**—When any clerk or other officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items and sworn to, in going, returning and attendance on the court, shall be audited and paid; but no mileage, or other compensation in addition to his salary, shall in any case be allowed. (Rev. Stats. sec. 850.)

§ 326. **Seamen sent home as witnesses.**—There shall be paid to each seaman or other person who is sent to the United States from any foreign port, station, sea or ocean, by any United States minister, *charge d'affaires*, consul, captain, or commander, to give testimony in any criminal case depending in any court of the United States, such compensation, exclusive of subsistence and transportation, as such court may adjudge to be proper, not exceeding one dollar for each day necessarily employed in such voyage, and in arriving at the place of examination or trial. In fixing such

compensation, the court shall take into consideration the condition of said seaman or witness, and whether his voyage has been broken up to his injury by his being sent to the United States.

When such seaman or person is transported in an armed vessel of the United States, no charge for subsistence or transportation shall be allowed. When he is transported in any other vessel, the compensation for his transportation and subsistence, not exceeding in any case fifty cents a day, may be fixed by the court, and shall be paid to the captain of said vessel accordingly. (Rev. Stats. sec. 851.)

§ 327. **Fees of grand and petit jurors.**—For actual attendance at any court or courts, and for the time necessarily occupied in going to and returning from the same, three dollars a day during such attendance. For the distance necessarily traveled from their residence in going to and returning from said court by the shortest practicable route, five cents a mile. (Rev. Stats. sec. 852; 21 U. S. Stats. 43; 1 Sup. Rev. Stats. 497.)

Note.—Where a person is summoned as a juror, and at the same term subpoenaed by the United States as a witness, he is entitled to compensation for each service (Edwards v. Bond, 5 McLean, 300; Fed. Cas. No. 4294); and a juror from a distance may be allowed per diem for days during which the panel stands adjourned. (Parker v. Kempton, 1 Wall. Jr. 344; Fed. Cas. No. 10741.)

§ 328. **Mileage in Pacific States.**—Jurors and witnesses in the United States courts in the States

of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, and Colorado, and in the Territories of New Mexico, Arizona and Utah, shall be entitled to and receive fifteen cents for each mile necessarily traveled over any stage line or by private conveyance, and five cents for each mile over any railway in going to and returning from said courts; *provided*, that no constructive or double mileage fees shall be allowed by reason of any person being summoned both as witness and juror, or as witness in two or more cases pending in the same court and triable at the same term thereof. (27 U. S. Stats. 347.)

Mileage.—More than one traveling fee may be taxed as costs for the same witness, where his attendance was required on different occasions by reason of the sole fault of the defeated party. (Hake v. Brown, 44 Fed. Rep. 734.)

§ 329. **Printers' fees.**—For publishing any notice or order required by law, or the lawful order of any court, department, bureau, or other person, in any newspaper, except as mentioned in sections thirty-eight hundred and twenty-three, thirty-eight hundred and twenty-four, and thirty-eight hundred and twenty-five, title, "Public Printing, Advertisements, and Public Documents," forty cents per folio for the first insertion, and twenty cents per folio for each subsequent insertion. The compensation herein provided shall include the furnishing of lawful evidence under oath, of publication, to be made and furnished by the printer or publisher making such publication. (Rev. Stats. sec. 853.)

Printing records.—A charge for printing the record and brief in compliance with the rules of the United States circuit court in the second circuit is a proper item of disbursement. (Hake v. Brown, 44 Fed. Rep. 734.) Fees for final records in criminal cases cannot be limited to four folios in each case by an arbitrary rule. (Marvin v. United States, 44 Fed. Rep. 405.)

§ 330. **Meaning of folio.**—The term folio, in this chapter, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted except when the whole statute, notice, or order contains less than fifty words. (Rev. Stats. sec. 854.)

Folio.—In determining the number of folios in a final record, each separate and distinct order, notice, or other paper is to be counted separately, according to the rule herein prescribed. (Erwin v. United States, 37 Fed. Rep. 470.)

§ 331. **Cost of printing taxed.**—And there shall be taxed against the losing party in each and every cause pending in the supreme court of the United States, or in the court of claims of the United States, the cost of printing the record in such case which shall be collected, except when the judgment is against the United States, by the clerks of said courts respectively, and paid into the treasury of the United States. (19 U. S. Stats. 344; 1 Sup. Rev. Stats. 288.)

Note.—If the expense of the record is no greater than it would be at the government printing office,

it may be taxed as costs. (Railroad Co. v. Collector, 96 U. S. 594.)

§ 332. **Payment of jurors and witnesses.**—In cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts. (Rev. Stats. sec. 855.)

§ 333. **Fees of district attorneys, etc.**—The fees of district attorneys, clerks, marshals and commissioners, in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the treasury. (Rev. Stats. sec. 856.) See Act of 1896, 29 U. S. Stats. 179-186.)

Note.—"Cases where the United States are liable to pay" refer to other than suits where the fees are collected from antagonists of the government. (U. S. v. Cigars, 37 Leg. Int. 237.) When officers collect fees in revenue cases, they may retain and account for them in their semiannual returns. (U. S. v. Cigars, 37 Leg. Int. 237.) Fees in cases where United States are liable to pay the same shall be paid on settling accounts at the treasury. (In re U. S. v. Cigars, 2 Fed. Rep. 495.) The provisions of the statutes providing for the retention of fees by clerks and other officers until the maximum of their compensation is reached, apply to fees other than those for which the government is responsible and which are to be paid out of the treasury. Services rendered the government by the clerk or other officers of the court in suits by it for which the law fixes certain fees render the government liable therefor, whether

it succeeds in collecting its legitimate costs or not. (United States v. Wolters, 51 Fed. Rep. 896.)

§ 333 a. **Purchase of fees, etc., of court officers prohibited.**—That it shall hereafter be unlawful for any United States marshal or deputy marshal, or any clerk or deputy clerk of any court of the United States or of any Territory thereof, or any United States attorney or assistant attorney, or any United States judge, or United States commissioner, or any other person holding any office, employment or position of trust or profit under the Government of the United States to purchase at less than the full face value thereof, either directly or indirectly, any claim for fee, mileage or expenses of any witness, juror, deputy marshal or any other officer of court whatsoever against the United States Government. (29 U. S. Stats. 595.)

§ 334. **Fees, how recovered.**—The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the treasury, shall be recovered in like manner as the fees of the officers of the States, respectively, for like services are recovered. (Rev. Stats. sec. 857.)

Fees, how collected.—This section provides for officers retaining their fees. (In re U. S. v. Cigars, 2 Fed. Rep. 495.) The fees other than those which are to be paid out of the treasury are those which are taxed and collected in suits; and these are to be recovered as like fees are recovered by similar officers of the State. (In re U. S. v. Cigars, 2 Fed. Rep. 496.) If there were no other mode of payment provided by

law, under this section the services of the marshal upon the arrest of a vessel might be deemed covered by the statutory expression "like services." But under the law and practice of New York, the sheriff's fees must be paid at the time by the person who receives the property, and this rule is applicable to the marshal's fees. A similar rule has long existed in the English admiralty practice. (The Georgeanna, 31 Fed. Rep. 405.) Under this section a marshal who has incurred large expenses in caring for and preserving a vessel in his custody is entitled to a reimbursement thereof out of the proceeds of her sale in the registry without awaiting the final decree in the cause. (The Allegheny, 85 Fed. Rep. 463.) The above section does not make applicable to the Federal courts a special State statute applying only to a certain part of the State, and establishing a practice different from the general law of the State. (Aiken v. State, 13 U. S. App. 394; 57 Fed. Rep. 423.)

§ 335. **Suit by a poor person, costs and counsel.** —Any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action. (27 U. S. Stats. 252.)

Action by poor person.—The right given to a poor person to bring a suit without prepayment of fees or costs embraces the right to appeal to the circuit court of appeals. When the proper oath has been filed no appeal bond can be required. (Fuller v. Montague, 53 Fed. Rep. 206.) By the above act the privilege of suing in forma pauperis is granted to every poor person in the jurisdiction of the United States. (St. Louis & S. F. Ry. Co. v. Farr, 12 U. S. App. 520; 56 Fed. Rep. 994.) If the clerk of the circuit court refuses to deliver the record for filing in an appellate court until his fees are paid, the circuit court, on granting summary relief, will require the appellant to file an affidavit of poverty in the appellate court. (Columb v. Webster Mfg. Co., 76 Fed. Rep. 198.) When one shows a right to sue in forma pauperis the court will appoint an attorney for him, whose fee will be contingent on success, and in any event will not be larger than the quantum meruit. (Whelan v. Manhattan Ry. Co., 86 Fed. Rep. 219.) The act does not apply to a person who receives a salary of twenty dollars per week, and who pays two hundred dollars per year for the rent of the house he lives in. (Wickelman v. Dick Co., 85 Fed. Rep. 851.)

"Fees or costs."—The word "costs," used in the above section, means taxable costs to be recovered by the adverse party. "Fees" means fees of officers in the strict sense. (Columb v. Webster Mfg. Co., 76 Fed. Rep. 198.)

Affidavit of poverty.—The sworn statement mentioned in the statute must show that plaintiff is a citizen, and that there is no person interested who is able to pay or secure the costs. (Boyle v. Great Northern Ry. Co., 63 Fed. Rep. 539.) Pending an application for the allowance of an appeal defendant

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cannot move to dismiss the case because the oath for leave to prosecute in form a pauperis was defective both in form and in substance. (Fuller v. Montague, 53 Fed. Rep. 206.) It is the filing of the affidavit, and not in truth of it, that constitutes an answer to defendant's demand. (McDuffee v. Boston & M. R. Co., 82 Fed. Rep. 865.) An affidavit of facts showing that the cause is not frivolous should also be filed. (Whelan v. Manhattan Ry. Co., 86 Fed. Rep. 219.)

§ 336. **Affidavit when demand for fees, etc., is made.**—After any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and willful false swearing in any affidavit provided for in this or the previous section shall be punishable as perjury is in other cases. (27 U. S. Stats. 252.)

§ 337. **Process, etc., to issue.**—The officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases. (27 U. S. Stats. 252.)

§ 338. **Assignment of counsel—Costs on judgment.**—The court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged

cause of action is frivolous or malicious. Judgment may be rendered for costs at the conclusion of the suit, as in other cases. *Provided*, that the United States shall not be liable for any of the costs thus incurred. (27 U. S. Stats. 252.)

Dismissal of cause.—In view of the above section, the clerk should not ordinarily assume to act under the statute without prior conference with the court. (Columb v. Webster Mfg. Co., 76 Fed. Rep. 198.)

CHAPTER XVII.

JURIES.

§ 339. Jurors, qualifications and selection of.
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§ 341. Jurors, per diem.
§ 342. Jurors, how drawn.
§ 343. Qualifications.
§ 344. Juries interchangeable.
§ 345. Jurors, how apportioned.
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§ 348. Special juries.
§ 349. Number of grand jurors.
§ 350. Foreman of grand jury.
§ 351. Grand juries, when summoned.
§ 352. Discharge of grand juries.
§ 353. Juries not to be summoned oftener than once in two years.
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§ 355. Challenges.
§ 356. Challenges in summary trials.
§ 357. Grand and petit jurors.
§ 358. Rules in particular states.

§ 339. Jurors, qualifications and selection of.—Jurors to serve in the courts of the United States in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such

jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such State court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said court may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the State courts from time to time in force in such State. (Rev. Stats. 800.)

Note.—See United States v. Rose, 6 Fed. Rep. 136.

Qualifications of juror.—Qualifications relate to the juror personally as to age, property, or citizenship (U. S. v. Collins, 1 Woods, 499; Fed. Cas. No. 14837), and not to special reasons, which, if they exist, do not disqualify the juror. (U. S. v. Williams, 1 Dill. 485; Fed. Cas. No. 16716.) This section relates to qualifications which are requisite according to the law and practice of the respective States. (U. S. v. Insurgents, 2 Dall. 335; U. S. v. Collins, 1 Woods, 499; Fed. Cas. No. 14837; U. S. v. Wilson, 6 McLean, 604; Fed. Cas. No. 16737; U. S. v. Gardner, 5 Chic. L. N. 501; Fed. Cas. No. 15187; U. S. v. Coit, 1 Car. Law Repos. 346; Fed. Cas. No. 14829; contra, U. S. v. Price, 3 Hall L. J. 121; Fed. Cas. No. 16088.) The placing of a man's name on the tax-book implies only the qualification of being a tax-payer. (U. S. v. Collins, 1 Woods, 499; Fed. Cas. No. 14837.) Persons exempt are not thereby disqualified. (U. S. v. Gardner, 5 Chic. L. N. 501; Fed. Cas. No. 15187.) It is not necessary that the rule specify the qualifications, as jurors may be objected to by challenge (U. S. v. Collins, 1 Wood, 499; Fed. Cas. No. 14837), according to

the practice under the State law (U. S. v. Douglass, 2 Blatchf. 207; Fed. Cas. No. 14989; U. S. v. Reed, 2 Blatchf. 435; Fed. Cas. No. 16134; U. S. v. Tallman, 10 Blatchf. 21; Fed. Cas. No. 16429; U. S. v. Tuska, 14 Blatchf. 5; Fed. Cas. No. 16550), unless act of Congress expressly provides for peremptory challenges (U. S. v. Shackleford, 18 How. 588), as this section does not relate to peremptory challenges. (U. S. v. Devlin, 6 Blatchf. 71; Fed. Cas. No. 14953; U. S. v. Douglass, 2 Blatchf. 207; Fed. Cas. No. 14989.) The court may direct the summoning of any number of jurors (U. S. v. Insurgents, 2 Dall. 335; U. S. v. Fries, 3 Dall. 515; U. S. v. Dow, Taney, 34; Fed. Cas. No. 14990); and they should be selected from the district at large. (U. S. v. Woodruff, 4 McLean, 105; Fed. Cas. No. 16758.) If a juror becomes sick after an opening statement he may be discharged and another selected, if that is allowable under the State law. (Silsby v. Foote, 14 How. 218.) A territorial court is not deprived of its jurisdiction to try a person indicted for a criminal offense by the fact that an alien sat on the grand jury that found the indictment, under a provision of a territorial statute permitting it. (Ex parte Harding, 120 U. S. 783.) Federal courts of their own motion, or that of counsel, may enforce other objections than prescribed by State statutes to grand jurors. (United States v. Jones, 69 Fed. Rep. 973.)

§ 340. **Race or color not to exclude.**—No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any

duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars. (18 U. S. Stats. 336; 1 Sup. Rev. Stats. 149.)

Note.—No person charged with a crime involving life or liberty is entitled by the United States Constitution to have his race represented upon the grand jury that may indict him, or upon the petit jury that may try him. (In re Shibuya Jugiro, 140 U. S. 291; In re Wood, 140 U. S. 278, 370.)

§ 341. **Jurors, per diem.**—That the *per diem* pay of each juror, grand or petit, in any court of the United States, shall be two dollars. (21 U. S. Stats. 43.)

§ 342. **Jurors, how drawn.**—And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one

name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State. (21 U. S. Stats. 43.)

Drawing jurors.—In drawing jurors the great object is to obtain qualified jurors, and this is effected by the courts of the United States and their officers, and is under the sole regulation of Congress. (United States v. Collins, 1 Woods, 499, Fed. Cas. No. 14837; United States v. Woodruff, 4 McLean, 105, Fed. Cas. No. 16758; United States v. Gardner, 5 Chic. L. N. 501, Fed. Cas. No. 15187.) The State law does not apply. (Alston v. Manning, 1 Chase, 460, Fed. Cas. No. 266; United States v. Collins, 1 Woods, 499, Fed. Cas. No. 14837.) The marshal is substituted for the ordinary, who acts under State laws (United States v. Collins, 1 Woods, 499, Fed. Cas. No. 14837; United States v. Woodruff, 4 McLean, 105, Fed. Cas. No. 16758); and the jurors need not be taken from the lists made by State authority; conformity is required only in two respects: first, as to qualifications and exemptions; second, as to the mode of designating and impaneling (United States v. Collins, 1 Woods, 499, Fed. Cas. No. 14837; see United States v. Gardner, 5 Chic. L. N. 501, Fed. Cas. No. 15187); but a literal conformity is not required. (United States v. Tallman, 10 Blatchf. 21, Fed. Cas. No. 16429; United States v. Wilson, 6 McLean, 604, Fed. Cas. No. 16737.) The act of Congress of June 30, 1879, having reference to drawing jurors for the Federal courts, did not repeal U. S. Rev. Stats. secs. 800, 802, 804, 808, prescribing the qualifications, etc., of jurors. (United States v. Eagan, 30 Fed. Rep. 608.)

§ 343. **Qualifications.**—And no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith; *provided*, that no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude. (21 U. S. Stats. 43.)

Note.—The provisions of this section are mandatory (United States v. Ambrose, 3 Fed. Rep. 283), and any irregularity which may arise from other than evil motives will not be fatal. So, the mere fact that the name of one grand juror contained in the venire was not put in the box nor drawn will not vitiate the indictment, unless the act was done in bad faith. (United States v. Ambrose, 3 Fed. Rep. 283.) This provision as to qualifications is authorized by the Thirteenth and Fourteenth Amendments (Ex parte Virginia, 100 U. S. 339).

§ 344. **Juries interchangeable.**—Whenever any circuit and district court of the United States shall be held at the same time and place, they shall be authorized and required, if the business of the courts will permit, to use interchangeably the juries in either court drawn according to the provisions of said act. (25 U. S. Stats. 386.)

§ 345. **Jurors, how apportioned.**—Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as

not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services. (Rev. Stats. sec. 802.)

Note.—A jury cannot be selected from any particular locality without an order of court. (U. S. v. Coit, 1 Car. Law. Repos. 346, Fed. Cas. No. 14829; but see U. S. v. Price, 3 Hall. L. J. 121, Fed. Cas. No. 16088.) The part of the district from which jurors may be drawn is within the discretion of the court. (U. S. v. Stowell, 2 Curt. 153, Fed. Cas. No. 16409; U. S. v. Woodruff, 4 McLean, 105, Fed. Cas. No. 16758.)

§ 346. **Venire, how issued and served.**—Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. (Rev. Stats. sec. 803.)

§ 347. **Talesmen for petit juries.**—When from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may ap-

point, and such person shall be sworn, as provided in the preceding section. (Rev. Stats. sec. 804.)

Note.—This section is not repealed in terms by the act of June 30, 1879, nor is it repealed by implication. (U. S. v. Rose, 6 Fed. Rep. 137; St. Clair v. United States, 154 U. S. 134.) Whenever by reason of challenge there is not a petit jury, it is within the province of the court to direct the marshal to complete the panel by calling a sufficient number from the bystanders. (U. S. v. Rose, 6 Fed. Rep. 137; St. Clair v. United States, 154 U. S. 134.) Persons selected for the panel, and present in court when returned by the marshal, are bystanders, although they were not in court when summoned. (U. S. v. Loughery, 13 Blatchf. 267, Fed. Cas. No. 15631.)

§ 348. **Special juries.**—When special juries are ordered in any circuit court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several States. (Rev. Stats. sec. 805.)

§ 349. **Number of grand jurors.**—Every grand jury impaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If, of the persons summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed,

and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose. (Rev. Stats. sec. 808.)

Note.—This section does not apply to territorial courts. (Reynolds v. United States, 98 U. S. 145.) Although a person summoned as a grand juror fails to attend, yet the marshal cannot excuse him and substitute another in his place. (1 Burr's Trial, 37.) The court has power to determine the number to be summoned that a grand jury may be constituted. (United States v. Tuska, 24 Blatchf. 5, Fed. Cas. No. 16550.) Complaint cannot be made of the excusing of grand jurors by the court of its own motion where those substituted were not disqualified (United States v. Jones, 69 Fed. Rep. 973.)

§ 350. **Foreman of grand jury.**—From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury. (Rev. Stats. sec. 809.)

§ 351. **Grand juries, when summoned.**—No grand juries shall be summoned to attend any circuit or district court unless one of the judges of such circuit court, or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. And either of the said courts may in term order a grand jury to be summoned at such time and to serve such time as

it may direct whenever in its judgment it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found. (Rev. Stats. sec. 810.)

Note.—An order entered by the clerk by authority of the judge is of the same effect as if done by the judge himself. (United States v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16134.)

§ 352. **Discharge of grand juries.**—The circuit and district courts, the district courts of the Territories, and the supreme court of the District of Columbia, may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary. (Rev. Stats. sec. 811.)

§ 353. **Jurors not to be summoned oftener than once in two years.**—No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge. (Rev. Stats. sec. 812.)

Note.—It is not necessary that twenty-four months should elapse between the close of the term at which the juror serves and the beginning of the next term at which he is summoned. (United States v. Reeves,

3 Woods, 199, Fed. Cas. No. 16139.) That a grand juror has served within two years is not sufficient reason to quash an indictment. (United States v. Reeves, 3 Woods, 199, Fed. Cas. No. 16139.) This section does not apply to the courts of the District of Columbia; they are governed by D. C. Rev. Stats. sec. 816. (United States v. Nardello, 4 Mackey 503.) A person engaged in business in Washington, claiming residence in Virginia—Held, on the facts, a competent juror, under D. C. Rev. Stats. sec. 872. (Id.)

§ 354. **Grand juries of district courts may act in case cognizable in circuit courts.**—The grand jury impaneled and sworn in any district court may take cognizance of all crimes and offenses within the jurisdiction of the circuit court for said district as well as of said district court. (Rev. Stats. sec. 813.)

§ 355. **Challenges.**—When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers. [See secs. 1031-4303.] Rev. Stats. sec. 819.)

Note.—Any other felony means other offenses than capital (United States v. Coppersmith, 4 Fed. Rep. 198); and in such cases this section operates to give the defendant ten challenges, where the offense is declared by statute to be a felony; and where Congress punishes it by its common-law name and at common law it is a felony, or where Congress adopts a State law which designates it as a felony. (United States v. Coppersmith, 4 Fed. Rep. 198.) It is intended by the term "any other felony" to designate other offenses than capital offenses. (United States v. Coppersmith, 4 Fed. Rep. 199.) On removal of a criminal case from the State court, the number of challenges is regulated by this section and not by the State law. (Georgia v. O'Grady, 3 Woods, 496, Fed. Cas. No. 5352; see United States v. Marchant, 12 Wheat. 480.) An objection that some of the grand jurors were not properly summoned or did not possess the proper qualifications cannot be taken by plea in abatement. (United States v. Tuska, 14 Blatchf. 5, Fed. Cas. No. 16550.) The act of Congress of June, 1872, as embodied in this section, restricts parties indicted for felony to twenty peremptory challenges, and where several parties are indicted for a joint felony they are deemed a single party for the purposes of all challenges under that section. (United States v. Hall, 44 Fed. Rep. 883.) Defendants cannot in different actions be deprived of their several challenges to jurors by the order of the court that the cases shall be tried together (Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285). In a Federal court it constitutes no ground of challenge to the array of jurors that three of the persons named in the venire had died after their names were placed in the wheel, and before the time of the drawing (Pullman's Palace Car. Co. v. Harkins, 17 U. S. App. 22; 55 Fed. Rep. 932). A decision of the trial judge upon a challenge to the

favor, the question before him being in the main one of fact which he has the benefit of seeing the bearing and appearance of a juror, should not be set aside by an appellate court except for manifest error (Press Pub. Co. v. McDonald, 38 U. S. App. 557; 73 Fed. Rep. 440).

§ 356. **Challenges in summary trials.**—At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause in such cases shall be tried by the court without the aid of triers. (Rev. Stats. sec. 4303.)

§ 357. **Grand and petit jurors.**—No person shall be a grand or petit juror in any court of the United States, upon any inquiry, hearing or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of title "Civil Rights" and of title "Crimes," for enforcing the provisions of the Fourteenth Amendment to the Constitution, who is, in the judgment of the court, in complicity with any combination or conspiracy in said titles set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing or trial, take and subscribe an oath in open court, that he has never, directly or indirectly, counseled, advised, or voluntarily aided any such combination or conspiracy. (Rev. Stats. sec. 822.)

Note.—The right to require the panel to serve the term, to take the oath on, or be discharged from the panel, is limited to the district attorney. (Atwood v. Weems, 99 U. S. 183.)

§ 358. **Rules in particular States.**—ALABAMA.—All grand and petit jurors summoned for service in each division shall be inhabitants thereof. (23 U. S. Stats. 18.)

ARKANSAS.—In the western district of Arkansas such number of jurors shall be summoned at every term of the district court thereof, to be held at Helena, as may have been ordered at a previous term, or by the district judge in vacation. And a grand jury may be summoned to attend any such term when ordered by the court, or by the judge in vacation. In case of a deficiency of jurors, talesmen may be summoned by order of the court. (Rev. Stats. sec. 14.)

COLORADO.—Whenever the terms of the said circuit and district courts shall be held at the same time and place, grand and petit jurors summoned to attend in either of said courts may serve in the other of said courts, and but one grand or petit jury shall be summoned to attend on said courts at one and the same time; but this provision shall not prevent either of said courts from procuring the attendance of several panels of jurors successively, as the business of the courts may require. (Approved, April 20, 1880, sec. 2; 21 U. S. Stats. 76; 1 Sup. Rev. Stats. 517.) Jurors in the district and circuit courts of the United States in and for the State of Colorado shall be entitled to receive fifteen cents for each mile actually traveled in coming to or returning from said courts. (Approved, June 16, 1880; 21 U. S. Stats. 290.)

GEORGIA.—All grand and petit jurors summoned for service in each division shall be residents of such division. All mesne and final process, subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions. (21 U. S. Stats. 63; 1 Sup. Rev. Stats. 508; 25 U. S. Stats. 671, sec. 6.)

IDAHO.—Only one grand jury and one petit jury shall be summoned in both said circuit and district courts. (Approved, July 3, 1890; 26 U. S. Stats. 217.)

KENTUCKY AND INDIANA.—In the several districts of Kentucky and Indiana, such number of jurors shall be summoned by the marshal at every term of the circuit and district courts, respectively, as may have been ordered of record at the previous term; and in case there is not a sufficient number of jurors in attendance at any time, the court may order such number to be summoned as, in its judgment, may be necessary to transact the business of the court. And a grand jury may be summoned to attend every term of the circuit or district court by order of the court. The marshal may summon juries and talesmen in case of a deficiency, pursuant to an order of the court made during the term, and they shall serve for such time as the court may direct. (Rev. Stats. sec. 815.)

LOUISIANA.—All grand and petit jurors summoned for service in each division shall be residents of such division. (25 U. S. Stats. 388, 438.)

MICHIGAN.—One grand and one petit jury only shall be summoned, and serve in both said courts at each term thereof; and jurors shall be selected and drawn from the division of the said district in which they reside and in which the terms of the said circuit and district courts to which they are summoned are held. (20 U. S. Stats. 175; 28 U. S. Stats. 68.)

MINNESOTA.—A grand and petit jury shall be summoned for each of said terms (of the circuit and district courts) which petit jury shall be competent to sit and act as such jury in either or both of said courts at such terms; *provided*, that the judge of the district court may, in his discretion, dispense with the summoning or impaneling of more than one grand jury in each year in any of said divisions. (Approved, April 29, 1890; 26 U. S. Stats. 73, sec. 6.)

MISSISSIPPI.—Whenever the circuit and district courts in the southern district of Mississippi shall be held at the same time and place, only one grand jury and the necessary number of petit jurors shall be summoned for both courts, and they shall be the grand and petit jurors for both said courts. (Approved, April 4, 1888; 25 U. S. Stats. 78.) All grand and petit jurors summoned for service in said eastern division of said southern district shall be residents of said division. (28 U. S. Stats. 115.) Juries shall be summoned for the additional courts hereby created as now provided by law for the summoning of juries in said northern district. (22 U. S. Stats. 101.)

MISSOURI.—Juries shall be summoned for the courts hereby created [in the several subdivisions of the districts], as now provided by law for the summoning of juries in the said districts, and whenever the circuit and district courts in either of said districts or divisions shall be held at the same time and place, jurors shall not be summoned for each of said courts, but for both said courts, and they shall act accordingly as grand and petit jurors for both said courts. (Approved, May 14, 1890; 24 U. S. Stats. 424; 26 U. S. Stats. 106, sec. 3.)

NEW YORK.—No jury shall be drawn for service exclusively in the circuit court for the northern district of New York at the terms thereof required by law to be held at Albany and Syracuse, or at the adjourned term thereof required by law to be held at Utica, if a jury is drawn to serve in the district court held at the same time and places with said terms and adjourned term, but it shall be used for the trial of issues of fact arising in civil and criminal causes in said circuit court; and the verdicts of said jury and all proceedings upon the trial of said issues shall be of the same effect as if the said jury had been drawn to serve in the said circuit court. (Approved March 23, 1882; Rev. Stats. sec. 806, repealing the original section 806 of the Rev. Stats.; United States v. Rose, 6 Fed. Rep. 137.)

NORTH CAROLINA.—The circuit and district courts for either of the districts of North Carolina may order a grand or petit jury, or both, to attend any special term thereof, by an order to

be entered of record thirty days before the day on which such special term is appointed to convene. (Rev. Stats. sec. 816.)

NORTH DAKOTA.—When the circuit court and district court is held, as provided in this act, at the same time and place, one grand and one petit jury only shall be summoned and serve in both said courts. (26 U. S. Stats. 14.)

OHIO.—One grand jury and one petit jury only shall be summoned and serve in both of said courts at each term thereof. (20 U. S. Stats. 101.)

Northern and Southern Districts.—All grand and petit jurors summoned for service in each division shall be residents of such division. All mesne and final process, subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions. (20 U. S. Stats. 101; 1 Sup. Rev. Stats. 339; 21 U. S. Stats. 64; 1 Sup. Rev. Stats. 509.)

SOUTH CAROLINA.—The grand and petit juries for the district court sitting in the western district of South Carolina shall be drawn from the inhabitants of said district who are liable, according to the laws of said State, to do jury duty in the courts thereof; and all jurors shall be drawn during the sitting of the court for the next succeeding term. (Rev. Stats. sec. 817.)

SOUTH DAKOTA.—When the circuit court and district court are held, as provided in this act, at the same time and place, one grand and petit jury only shall be summoned and serve in both

said courts, and all grand and petit juries for the circuit and district courts shall be drawn by the clerk of the circuit court, and all grand and petit jurors summoned for service in each division shall be residents of such division. (28 U. S. Stats. 6.)

TENNESSEE.—All grand and petit jurors summoned for service in each division shall be residents of such division. All mesne and final process subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions. (21 U. S. Stats. 175.)

UTAH.—Only one grand jury and one petit jury shall be summoned in both of said courts. (28 U. S. Stats. 111.)

VERMONT.—The clerk of the district court for Vermont shall not cause a petit jury to be summoned or returned to any session in which there shall appear to be no issue proper for trial by jury, unless by special order of the judge. (Rev. Stats. sec. 807.)

In the district of Vermont, it shall be the duty of the circuit court, at its regular sessions, to give in charge to the grand juries all crimes, offenses, and misdemeanors which are cognizable as well in the district court thereof as in the said circuit court. (Rev. Stats. sec. 818.)

CHAPTER XVIII.

HABEAS CORPUS.

§ 359. Power to issue.
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§ 359. Power to issue.—The supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus*. (Rev. Stats. sec. 751.)

Nature of proceeding in habeas corpus.—A proceeding in habeas corpus is a civil and not a criminal proceeding (Cross v. Burke, 146 U. S. 82).

Power to issue.—This section vests the power to issue the writ of habeas corpus in all the courts of the United States, and the next section vests it in every justice or judge of the United States. (Ex parte

Bollman, 4 Cranch, 75; Ex parte Milligan, 4 Wall. 2.) It may issue from the supreme court to release one imprisoned under sentence of an inferior Federal court (U. S. v. Hamilton, 3 Dall. 17; Ex parte Burford, 3 Cranch, 448; Ex parte Siebold, 100 U. S. 371; Ex parte Lange, 18 Wall. 163; Ex parte Yerger, 8 Wall. 85; Ex parte McCardle, 7 Wall. 506; S. C. 6 Wall. 318); as where a person is arrested on a bench-warrant (Ex parte Virginia, 100 U. S. 339; U. S. v. Hamilton, 3 Dall. 17), although the commitment was made by a court having power to commit. (Ex parte Bollman, 4 Cranch, 75; Ex parte Burford, 3 Cranch, 448; U. S. v. Hamilton, 3 Dall. 17.) It will issue whenever it is an exercise of appellate jurisdiction. (Ex parte Virginia, 100 U. S. 339; Ex parte Yerger, 8 Wall. 85.) It can only issue when it is necessary for the exercise of its jurisdiction. (Ex parte Barry, 2 How. 65; Ex parte Milburn, 9 Peters, 704; Ex parte Vallandigham, 1 Wall. 243.) So it may issue to determine whether the detention of a prisoner is lawful (Ex parte Watkins, 7 Peters, 568), and it may revise the proceedings, no matter in what custody the prisoner may be (Ex parte Yerger, 8 Wall. 85); but the supreme court has no power to award the writ to inquire into the validity of a commitment made by a judge at chambers. (Ex parte Metzger, 5 How. 176.) An alien cannot obtain the writ in the supreme court (Ex parte Barry, 2 How. 65); and whether the writ will issue to release one held under sentence of a court-martial, quaere. (Ex parte Mason, 105 U. S. 696.) In what cases the Federal courts have power to issue writ of habeas corpus, see Ex parte Royal, 117 U. S. 241; Ex parte Crouch, 112 U. S. 178; In re Ah Jow, 29 Fed. Rep. 181; Ex parte Perkins, 29 Fed. Rep. 900; Wildenhus's Case, 120 U. S. 1; Ex parte Davis, 21 Fed. Rep. 396; Ex parte Mirzan, 119 U. S. 584; Re Neagle, 39 Fed. Rep. 833; 40 Alb. L. J. 284; Medley, Peti-

tioner, 134 U. S. 160; Savage, Petitioner, 134 U. S. 176.

Power of supreme court to issue writ.—Except in cases affecting ambassadors, or other public ministers or consuls, it can issue the writ only in aid of its appellate jurisdiction. (Ex parte Hung Hang, 108 U. S. 552.) The power of this court is expressly conferred by statute, and extends to the cases, among others, of prisoners in jail under or by color of the authority of the United States, and of persons who are in custody in violation of the Constitution or laws of the United States. (Rev. Stats., secs. 751, 752, 753; Re Terry, 128 U. S. 289.) The writ will not issue out of this court where it may as well issue from the proper circuit court where no special circumstances make it necessary or expedient. (Re Huntington, 137 U. S. 63. See Ex parte Mirzan, 119 U. S. 584.) The supreme court will inquire as to the jurisdiction of an inferior court, as to the subject-matter or the person, even if the inquiry involves facts outside of the record, if not inconsistent therewith. (Re Mayfield, 141 U. S. 107; Ex parte Yerger, 8 Wall. 85; Ex parte Virginia, 100 U. S. 339; Ex parte Carll, 106 U. S. 521; Ex parte Yarbrough, 110 U. S. 651; Ex parte Bigelow, 113 U. S. 328; Re Nielsen, 131 U. S. 176; Re Savin, 131 U. S. 267; Re Cuddy, 131 U. S. 280.) The supreme court cannot discharge a person imprisoned under sentence of a territorial court, unless the sentence exceeds the jurisdiction. (Re Harding, 120 U. S. 782.) The jurisdiction of this court to review the judgments of the inferior courts of the United States in criminal cases, by habeas corpus, is limited to the question of the power of the court to try or to commit the prisoner for the act of which he has been convicted. (Ex parte Curtis, 106 U. S. 371; Ex parte Reed, 100 U. S. 13; Ex parte Virginia, 100 U. S. 339; Ex parte Carll, 106 U. S. 521.)

If any inferior court of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus (Horner v. United States, 143 U. S. 570).

From the Federal courts.—The Federal courts are vested with power to issue the writ (In re Turner, 1 Abb. U. S. 84, Fed. Cas. No. 14247; Bennett v. Bennett, Deady, 300, Fed. Cas. No. 1318; Ex parte Des Rochers, McAll. 68, Fed. Cas. No. 3824; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12968; U. S. v. Williamson, 4 Am. Law. Reg. 5, Fed. Cas. No. 16726), as in extradition cases (Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7597; In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13563; Ex parte McKean, 3 Hughes, 23, Fed. Cas. No. 8848.) It may be issued to release a party from imprisonment under sentence of a court-martial (Meade v. Deputy Marshal, 1 Brock, 324, Fed. Cas. No. 9372), or to inquire into the validity of an enlistment into the military service (Ex parte Schmeid, 1 Dill. 587, Fed. Cas. No. 12461; In re McDonald, 1 Low, 100, Fed. Cas. No. 8752; In re Keeler, Hemp. 306, Fed. Cas. No. 7637; U. S. v. Anderson, Cooke, 143). It may issue although the party is not in jail and there has been no formal commitment (In re McDonald, 1 Low, 100, Fed. Cas. No. 8752), or although he is arrested under civil process (Ex parte Reardon, 2 Cranch, C. C. 639, Fed. Cas. No. 11615; Ex parte Randolph, 2 Brock, 447, Fed. Cas. No. 11558; In re Snow, 3 Wood & M. 430, Fed. Cas. No. 13143; see Ex parte Wilson, 6 Cranch, 52; Wilson v. Marshal, 1 Cranch, C. C. 608, Fed. Cas. No. 17822. It may issue where a prisoner is under conviction and sentence as well as under commitment (In re Greathouse, 4 Sawy. 487, 2 Abb. U. S. 382, Fed. Cas. No. 5741). Where there can be no inquiry whether the charge constitutes an offense until the meeting of the grand jury, and no relief from imprisonment

meantime, a writ of habeas corpus is proper (In re Barber, 75 Fed. Rep. 980). Federal courts have jurisdiction upon a writ of habeas corpus to inquire into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or omitted in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued. (Re Neagle, 39 Fed. Rep. 833; In re Hultman, 70 Fed. Rep. 699). The boundaries of a State cannot be determined on habeas corpus (In re Chavez, 72 Fed. Rep. 1006). Habeas corpus may be issued where a Chinaman is held in custody on a vessel in the port of San Francisco, and not permitted to enter the United States. (United States v. Jung Ah Lung, 124 U. S. 621; overruling Re Cummings, 32 Fed. Rep. 75.) A Federal court has jurisdiction to issue a writ of habeas corpus to determine whether an Indian arrested for violation of State game laws is properly restrained where the act done was permitted by a treaty between the United States and the tribe, in force before the admission of the state. (In re Race Horse, 70 Fed. Rep. 598.) A person imprisoned by local authorities, contrary to a treaty, for an offense on board a foreign vessel in a United States port, may enforce his rights under the treaty by writ of habeas corpus, in any proper court of the United States. (Mali v. Keeper of Common Jail, 120 U. S. 1.) It is only in exceptional and urgent cases that the Federal courts will interpose by the writ of habeas corpus to discharge prisoners held in custody under State authority (State of New York v. Eno, 155 U. S. 89; Cook v. Hart, 146 U. S. 183; Bergemann v. Backer, 157 U. S. 655; Whitten v. Tomlinson, 160 U. S. 231; Baker v. Grice, 169 U. S. 284; In re Nelson, 69 Fed. Rep. 712; In re Huse, 48 U. S. App. 318; 79 Fed. Rep.

305; in re Murphy, 87 Fed. Rep. 549; In re Moore, 75 Fed. Rep. 821; In re Krug, 79 Fed. Rep. 308; In re May, 82 Fed. Rep. 422; In re Alexander, 84 Fed. Rep. 633; In re Flinn, 57 Fed. Rep. 496; In re McKnight, 52 Fed. Rep. 799; In re Lawrence, 80 Fed. Rep. 99; Ex parte Whitten, 67 Fed. Rep. 230). Yet the Federal court has the power to issue a writ in such cases if special circumstances should require (In re Grice, 79 Fed. Rep. 627; Baker v. Grice, 169 U. S. 284; Iasigi v. Van De Carr, 166 U. S. 391; Kelly v. State of Georgia, 68 Fed. Rep. 652; Ex parte Jersey, 66 Fed. Rep. 957). The matter is within the discretion of the court whether to issue the writ or to put the prisoner to his writ of error to the highest State court (In re King, 51 Fed. Rep. 434; In re Bennett, 84 Fed. Rep. 324). The refusal of a State court to grant a writ of error to a person convicted of murder will not itself warrant a court of the United States in issuing a writ of habeas corpus (Kohl v. Lehlback, 160 U. S. 293; Bergeman v. Backer, 157 U. S. 655). Habeas corpus may issue for the purpose of inquiring whether acts done by a person while in the service of the United States were done wantonly and with a criminal intent, such person being in custody, after preliminary examination in the State court (In re Lewis, 83 Fed. Rep. 159).

Not granted for mere correction of errors.—The writ will not issue to correct errors where they may be corrected by appeal to the State supreme court. (In re Duncan, 139 U. S. 449; Sternaman v. Peck, 80 Fed. Rep. 883; In re King, 51 Fed. Rep. 434; In re Albert Frederich, 149 U. S. 70; In re M. V. Tyler, 149 U. S. 164; In re Swan, 150 U. S. 637; Re Chapman, 156 U. S. 211; In re Debs, 158 U. S. 564; In re Belt, 159 U. S. 95; Gonzales v. Cunningham, 164 U. S. 612; Ex parte Lennon, 166 U. S. 548.) It will not be granted to release one convicted of selling intoxicating liquors,

where an appeal was the proper remedy. (Allen v. Black, 43 Fed. Rep. 228.) Where a United States commissioner has jurisdiction of the subject-matter and of the person, irregularities in the proceedings before him are not reviewable on habeas corpus by the circuit court. (Stevens v. Fuller, 136 U. S. 468; Ex parte Rickelt, 61 Fed. Rep. 203.) The including in one indictment and sentence of illegal voting, both for a representative in Congress and for presidential electors, does not go to the jurisdiction of the State court, but is, at the worst, mere error, which cannot be inquired into by writ of habeas corpus. (Ex parte Crouch, 112 U. S. 178; In re Coy, 127 U. S. 756-759; In re Green, 134 U. S. 377.) Errors of law committed by the court that passed the sentence cannot be reviewed here on habeas corpus. (Ex parte Yarbrough, 110 U. S. 651; Ex parte Watkins, 3 Pet. 193; Ex parte Carll, 106 U. S. 621; Re Albert Frederich, 149 U. S. 70; Kohl v. Lehlback, 160 U. S. 293.) Errors committed in a criminal case by a State court of competent jurisdiction, while proceeding under statutes that do not conflict with U. S. Const., cannot be reached by habeas corpus in a Federal court. (In re Shibuya Jugiro, 140 U. S. 291; 35 L. ed. 510; In re Wood, 140 U. S. 278, 370; 35 L. ed. 505; Andrews v. Swartz, 156 U. S. 272; In re Maldonado, 63 Fed. Rep. 825.) Irregularities in the conduct of a case do not affect the final order so as to render it reviewable on habeas corpus. (Re Savin, 131 U. S. 267.) A writ of habeas corpus will be granted where a writ of error or appeal will not lie in a case where a petitioner is imprisoned under a judgment of the circuit court having no jurisdiction (In re Swan, 150 U. S. 637). The action of the court in consolidating indictments is not open to attack upon a habeas corpus proceeding (Howard v. United States, 43 U. S. App. 678; 75 Fed. Rep. 986).

When writ will be denied.—This court will deny the writ in cases where it may as well issue from the circuit court unless circumstances make action by this court necessary or expedient. (Re Huntington, 137 U. S. 63; Ex parte Mirzan, 119 U. S. 584.) Federal courts cannot, by habeas corpus, obstruct the ordinary administration of criminal laws of the States through their own tribunals. (In re Wood, 140 U. S. 278, 370.) The writ need not be awarded if it appear, upon the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison. (Ex parte Kearney, 7 Wheat. 38, 45; Ex parte Watkins, 3 Pet. 193, 201; Ex parte Milligan, 4 Wall. 2, 11; Re Terry, 128 U. S. 289; Ex parte King, 51 Fed. Rep. 434; Re Boardman, 169 U. S. 39.) A Federal court may refuse the writ to one arrested for violation of an unconstitutional statute where he might have set this up in defense to the action against him. (U. S. v. Fiscus, 42 Fed. Rep. 395.) It will be refused where the same question has been decided against the petitioner by another judge of the same court, in a cause then on trial in the court. (Re Simmons, 45 Fed. Rep. 241.) It will be refused where the statutes of a State regulating the selection of jurors do not conflict with the Federal constitution. The remedy for the wrong done by discriminations is not by writ of habeas corpus. If, in any case, the criminal laws are administered by the State court so as to discriminate against an accused person because of his race, the remedy for the wrong done to him is not by a writ of habeas corpus from a court of the United States. (In re Shibuya Jugiro, 140 U. S. 291; 35 L. ed. 510; In re Wood, 140 U. S. 278, 370.) So refusal to admit a person to bail pending a review of his conviction by the supreme court of the State is not a ground for a writ of habeas corpus from a

Federal court. (Re Humason, 46 Fed. Rep. 388.) The United States district court, or a judge thereof, has no jurisdiction to issue a writ of habeas corpus to recover the custody of a child withheld from its parent; nor to order the delivery of the child to its parent; nor to imprison for contempt for the disobedience of that order. In such cases they cannot take jurisdiction on the ground of diverse citizenship. (Re Burrus, 136 U. S. 586.) The United States circuit court may properly decline to interfere by habeas corpus to discharge one convicted or murder in a State court which had jurisdiction of the person and offense, and whose errors, if any, may be corrected by appeal to the State court of appeals. (Ex parte Royall, 117 U. S. 241; Ex parte Fonda, 117 U. S. 516; cited in In re Duncan, 139 U. S. 449.) The writ will not issue where a prisoner is held to answer an indictment unless it appears that the facts of the case cannot under any possible statement of them constitute a crime, or where an early hearing is necessary (In re Hacker, 73 Fed. Rep. 464).

§ 360. **Power of judges to grant.**—The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty. (Rev. Stats. sec. 752.)

A justice of the supreme court may issue the writ (Ex parte Clarke, 100 U. S. 399); and if he issues it at chambers, he cannot then adjourn the proceeding to the supreme court for hearing. (Ex parte Kaine, 14 How. 103.) If issued from the court, it cannot be made returnable before a judge at chambers. (Ex parte Kaine, 14 How. 103.) Federal judges should grant writs of habeas corpus to persons for acts done

in pursuance of a law of the United States. (Cunningham v. Neagle, 135 U. S. 1.)

§ 361. When prisoner is in jail.—The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify. (Rev. Stats. sec. 753.)

Prisoner in custody.—The prisoner is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, within the language of this section, when he is in custody in violation of the Constitution of the United States. (Ex parte Medley, 134 U. S. 160.) Imprisonment of an absconding debtor in jail on body executions and writs of attachment in civil actions will not defeat the power of a circuit court of the United States to issue a writ of habeas corpus in aid of extradition proceedings, notwithstanding the provisions of this section. (In re Mineau, 45 Fed. Rep. 188. See Re Cross, 13 Crim. L. Mag. 31; In re Fitton,

45 Fed. Rep. 471.) This section is quoted and applied in the case of Cunningham v. Neagle, 135 U. S. 1.) If a person at large surrenders himself or is surrendered by his sureties, and is in actual confinement, the writ may issue and the court will not consider an objection that he was surrendered by collusion (In re Grice, 79 Fed. Rep. 627). On habeas corpus to release a person held under a warrant of a U. S. commissioner to await an order of a district judge for his removal to another district to answer an indictment, the circuit court should examine the indictment to ascertain whether it charges any offense, or whether the court in which the indictment is pending has jurisdiction (In re Greene, 52 Fed. Rep. 104; In re Terrell, 51 Fed. Rep. 213). An immigrant held in custody on board a vessel by the master under the directions of the customs authorities is in custody under or by color of the authority of the United States (United States v. Chung Shee, 71 Fed. Rep. 277).

Habeas corpus—When writ will issue.—The writ cannot issue to release one committed under State authority, except as provided in this section (Ex parte Dorr, 3 How. 103; Ex parte McCann, 14 Am. Law Reg. 158; In re Veremaitre, 13 Law Rep. 608; Fed. Cas. No. 16915; Elkison v. Deliesseline, 1 Br. Col. Cas. 431; 2 Wheel. C. C. 56; Fed. Cas. No. 4366); and it must be made to appear that the imprisonment is for an act done in pursuance of Federal authority. (In re Bull, 4 Dill. 323; Fed. Cas. No. 2119.) So of a Federal court officer (In re Farrand, 1 Abb. U. S. 140; Fed. Cas. No. 4678; In re Neill, 8 Blatchf. 156; Fed. Cas. No. 10089; Ex parte Robinson, 1 Bond, 39; Fed. Cas. No. 11934; Ex parte Gifford, 5 Am. Law Reg. 659; Ex parte Robinson, 6 McLean, 355; Fed. Cas. No. 11935; Ex parte Jenkins, 2 Wall. J. 521; Fed. Cas. No. 7259; U. S. v. Morris, 2 Am. Law Reg. 348); or a person convicted in a State court for an act done

by him while in the military service of the United States (Coleman v. Tennessee, 97 U. S. 509); or a district attorney or marshal committed for contempt for not appearing instanter in a state court (Ex parte Turner, 3 Woods, 603; Fed. Cas. No. 14246); or a member of a canvassing board at an election at which members of Congress and presidential electors are to be chosen (Ex parte Hayne, 9 Chic. L. N. 106); or a supervisor for acts done in discharge of his duties (Ex parte Geissler, 4 Fed. Rep. 188); or a person convicted of perjury before an officer of the United States (Brown v. U. S., 2 Woods, 428; Fed. Cas. No. 1862; Ex parte Bridges, 2 Woods, 428; Fed. Cas. No. 1862); or a person imprisoned for a crime committed under the exclusive jurisdiction of the United States (Ex parte Tatem, 1 Hughes, 588; Fed. Cas. No. 13759); or a person convicted for the violation of the Constitution or a treaty (In re Wong Yung Quy, 2 Fed. Rep. 624); or a person convicted for murder committed while executing a writ issued by a Federal court (U. S. v. Jailer, 2 Abb. U. S. 265; Fed. Cas. No. 15463); or a person imprisoned under a State law that is unconstitutional (Ex parte McCready, 1 Hughes, 598; Fed. Cas. No. 8732); or an agent appointed by a governor of a State to make demand upon the governor of another State for a fugitive from justice (Ex parte Titus, 8 Ben. 411; Fed. Cas. No. 14062); or a party held under a warrant to await the requisition of the governor (In re Hoyle, 12 Chic. L. N. 279; Fed. Cas. No. 6803); or a party sent as a messenger to receive a fugitive from justice. (U. S. v. McClay, 23 Int. Rev. Rec. 80; Fed. Cas. No. 15660.) The power to arrest the arm of the State authorities under this section is one of delicacy, and should be exercised only when justice demands (Ex parte Thompson, 1 Flip. 507; Fed. Cas. No. 13934); and a party cannot be released on habeas corpus who, after giving bail for his appearance in the

Federal court, is subsequently arrested on a criminal charge. (U. S. v. French, 1 Gall. 1; Fed. Cas. No. 15105; U. S. v. Rector, 5 McLean, 174; Fed. Cas. No. 16132.) See note to section 359, ante.

§ 362. **Application for the writ.**—Application for writ of *habeas corpus* shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application. (Rev. Stats. sec. 754.)

Application for writ.—If a party applies to the supreme court, he must first show that the court has jurisdiction over the case. (Ex parte Milburn, 9 Peters, 704.) The writ will not issue as a matter of course, although it is a writ of right (In re Keeler, Hemp. 306; Fed. Cas. No. 7637; U. S. v. Lawrence, 4 Cranch C. C. 518; Fed. Cas. No. 15577); but when probable ground is shown that the party is in custody without just cause, it will be granted. (Ex parte Winder, 2 Cliff. 89; Fed. Cas. No. 17867.) Before it will be issued, it must appear that the party is detained against his will without authority, and is entitled to relief (Ex parte Keeler, Hemp. 306; Fed. Cas. No. 7637; Ex parte Davis, 14 Law Rep. 301; Fed. Cas. No. 3613.) The writ may be issued at the instance of a third party, who has no other interest than sympathy with the oppressed (In re Hoyle, 9 Am. Law Rec. 65; Fed. Cas. No. 6803; Ex parte Des Rochers, McAll. 68; Fed. Cas. No. 3824); and a wife may apply for a writ. (In re Ferrens, 3 Ben. 442; Fed. Cas. No.

4746.) If a party is detained under a commitment, he must produce a copy thereof, or an affidavit that the sheriff refused him a copy. (In re Harrison, 1 Cranch C. C. 159; Fed. Cas. No. 6131; U. S. v. Bollman, 1 Cranch C. C. 373; Fed. Cas. No. 14622.) The application must be supported by oath, taken before one of whom judicial notice will be taken as qualified to administer oaths. (In re Keeler, Hemp. 306; Fed. Cas. No. 7637.) The application must set forth the facts concerning the detention, in whose custody, and by virtue of what claim. (Re Cuddy, 131 U. S. 280.) Where the statement in the application is denied, it cannot be presumed that the statement is true. (Holden v. Minnesota, 137 U. S. 483.) Upon complaint in writing, signed by and verified by the oath of the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known, it is the duty of the court to "forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." (Rev. Stats., secs. 754, 755; In re Terry, 128 U. S. 289.) A petition for a writ of habeas corpus which does not impeach the judgment or original mittimus, directed to the marshal under which petitioner was actually committed, is bad (Howard v. United States, 75 Fed. Rep. 986). The petition must show the nullity of the judgment if it shows that the court was competent to try the offense, or the petition must show that he has served the sentence pronounced by it (In re Greenwald, 77 Fed. Rep. 590). Before issuing a writ to interfere with the execution of State laws the court should require the facts to be set out in the application, so that the court can see that there is a proper case to be investigated in this manner (In re Krug, 79 Fed. Rep. 308; King v. McLean Asylum, 21 U. S.

App. 407; 64 Fed. Rep. 325). No allegation of fact in a petition for habeas corpus can be assumed to be admitted unless distinct and unambiguous (Whittier v. Tomlinson, 160 U. S. 406). The complaint in habeas corpus alleging invalidity of process or proceedings under which the party is held in custody must set out copies of such process or proceedings, or the essential parts thereof; and mere averments of conclusions of law are inadequate (Craemer v. State of Washington, 168 U. S. 124).

§ 363. **Allowance and direction of the writ.**—The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained. (Rev. Stats. sec. 755.)

Writ, when issued.—Whether the writ shall issue or not depends upon the facts presented in the petition showing a cause for his release (Ex parte Kinney, 3 Hughes, 9; Fed. Cas. No. 7825; In re Haskell, 52 Fed. Rep. 795); and the truth or falsity of the fact must be determined at the hearing. (Ex parte Hayne, 9 Chic. L. N. 106.) Instead of directing the writ to issue in the first instance, the court may enter a rule to show cause. (Ex parte Milburn, 9 Peters, 704.) If the petition shows that the prisoner is rightfully detained, the court may refuse the writ (Ex parte Watkins, 3 Peters, 193; United States v. Lawrence, 4 Cranch. C. C. 518; Fed. Cas. No. 15577; Ex parte Milligan, 4 Wall. 2); and if the commitment is regular, he will not be released on the ground that he was insane when he committed the offense. (United States v. Lawrence, 4 Cranch. C. C. 518; Fed. Cas. No. 15577.)

§ 364. **Time of return.**—Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance, and not beyond a distance of a hundred miles, within ten days; and if beyond a distance of a hundred miles, within twenty days. (Rev. Stats. sec. 756.)

Note.—If the party to whom the writ is directed fails to make return, attachment may issue without an alias or pluries writ. (United States v. Bollman, 1 Cranch C. C. 373; Fed. Cas. No. 14622.)

§ 365. **Form of return.**—The person to whom the writ is directed shall certify to the court, or justice, or judge, before whom it is returnable the true cause of the detention of such party. (Rev. Stats. sec. 757.)

Return of writ.—The return should be signed by him to whom it is directed (Seavey v. Seymour, 3 Cliff. 439; Fed. Cas. No. 12596); and if the return be false or evasive, he may be committed for a contempt (United States v. Davis, 5 Cranch C. C. 622; Fed. Cas. No. 14926; United States v. Williamson, 3 Am. Law Reg. 729; Fed. Cas. No. 16725; S. C. 4 Am. Law. Reg. 5, Fed. Cas. No. 16726); and a petition from the person denying his detention cannot be filed (United States v. Williamson, 4 Am. Law Reg. 5; Fed. Cas. No. 16726.) If defendant is present in court, he may be directed to answer interrogatories without issuing a writ of attachment. (United States v. Green, 3 Mason, 482; Fed. Cas. No. 15256.) Where the return shows that the prisoner was charged with a crime against the laws of the United States and within the jurisdiction of that court, the order remanding him

was proper. (Palliser v. United States, 136 U. S. 257.) The return must specify the true cause of detention, and the petitioner may deny any of the facts set forth in the return. (Re Cuddy, 131 U. S. 280.) At common law, no evidence was necessary to support the return; it was deemed to import verity until impeached. (Crowley v. Christensen, 137 U. S. 86.) And this rule is not changed by any United States statute. (Id.) A return to a writ of habeas corpus is not demurrable for defects in averments, where they are supplied by petitioner's allegations and proofs. (In re Ah Toy, 45 Fed. Rep. 795.) Any defect in the sheriff's return to the writ of habeas corpus in failing to set forth the indictment and warrant of extradition, is no reason why the United States should take the prisoner out of the custody of the authorities of the State. (Whitten v. Tomlinson, 160 U. S. 231.)

§ 366. **Body of the party to be produced.**—The person making the return shall at the same time bring the body of the party before the judge who granted the writ. (Rev. Stats. sec. 758.)

Note.—It is the duty of the person making the return to bring in the body, or if that has passed beyond his control, to declare so far as he knows what has become of him (United States v. Williamson, 4 Am. Law Reg. 5; Fed. Cas. No. 16726); and simply declaring that the person is not in his power, custody, or control, unless all the material facts are stated, will not effect a discharge. (United Sattes v. Green, 3 Mason, 482; Fed. Cas. No. 15256.) Pending the examination, he is detained under the authority of the writ of habeas corpus, and may be bailed out from day to day or be remanded to jail (Ex parte Kaine, 14 How. 103); and if he is brought from the custody of a State officer under a writ of habeas cor-

pus ad testificandum, he will be remanded to such State officer's custody. (In re Hamilton, 1 Ben. 455; Fed. Cas. No. 5976.) While in custody under a writ of habeas corpus he cannot be arrested on a second warrant. (In re Farez, 7 Blatchf. 345; Fed. Cas. No. 4645.)

§ 367. **Day of hearing.**—When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time. (Rev. Stats. sec. 759.)

§ 368. **Denial of return.**—The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained. (Rev. Stats. sec. 760.)

Who may deny.—The person filing the petition may be some person other than the prisoner. (In re Hoyle, 12 Chic. L. N. 279; Fed. Cas. No. 6803.) The petitioner may deny any material fact set out in the return. (Seavey v. Seymour, 3 Cliff. 439; Fed. Cas. No. 12596; see Ex parte Kaine, 10 N. Y. Leg. Obs. 257; Fed. Cas. No. 7598.) Under this section no pleading is required after the traverse to the return. The new matter averred therein is to be deemed at issue. (In re Leary, 10 Ben. 198; Fed. Cas. No. 8162.) On habeas corpus the question of the identity of the prisoner with the person named in the warrant is always

open. (In re Leary, 10 Ben. 198; Fed. Cas. No. 8162.) But in habeas corpus proceedings for the discharge of a prisoner held under an extradition warrant issued by the governor of a State, the question of the prisoner's identity cannot be raised by demurrer to the return of the officer to the writ. (In re Bloch, 87 Fed. Rep. 981.) That the petitioner may deny any of the facts stated in the return, see In re Cuddy, 131 U. S. 280.

§ 369. **Summary hearing—Disposition of party.**—The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. (Rev. Stats. sec. 761.)

Review on writ.—The decision of an officer who commits a person for interference with the discharge of his duties may be inquired into on application for the writ of habeas corpus. (Ex parte Geisler, 4 Fed. Rep. 188.) So the decision of a board that a person is not exempt from a draft is not conclusive. (Case of Antrim, 5 Phila. 278; Fed. Cas. No. 495.) On a review upon the application by a party held under a commitment the inquiry is as to whether there is probable cause to believe that he committed the offense. (United States v. Johns, 4 Dall. 412; In re Farez, 7 Blatchf. 345; Fed. Cas. No. 4645; Ex parte Kaine, 10 New York Leg. Obs. 257; Fed. Cas. No. 7598.) If the commitment is by a commissioner the court may examine the evidence taken before him, to know whether it is proper to continue the confinement (In re Martin, 5 Blatchf. 303; Fed. Cas. No. 915; Ex parte Bennett, 2 Cranch C. C. 612, Fed. Cas. No. 1311); and if not in writing the commissioner may be required to state on oath the evidence upon which he

granted the commitment. (Ex parte Bennett, 2 Cranch C. C. 612; Fed. Cas. No. 1311.) The finding of the commissioner in favor of the jurisdiction is not conclusive upon the court upon an application for a writ of habeas corpus. (In re Newman, 79 Fed. Rep. 622.) If the commitment be by a commissioner for extradition, the court may determine the competency of the evidence on which to exercise judgment, but not whether legal evidence before the commissioner was sufficient or insufficient to warrant his conclusion (Ex parte Van Aernam, 3 Blatchf. 160; Fed. Cas. No. 16824; In re MacDonnell, 11 Blatchf. 79; Fed. Cas. No. 8771; In re Wahl, 15 Blatchf. 334; Fed. Cas. No. 17041; In re Stupp, 12 Blatchf. 501; Fed. Cas. No. 13563; In re Veremaitre, 9 N. Y. Leg. Obs. 137; Fed. Cas. No. 16915; In re Kaine, 10 N. Y. Leg. Obs. 257; Fed. Cas. No. 7598; In re Heilbronn, 12 N. Y. Leg. Obs. 65; Fed. Cas. No. 6323; but see In re Henrich, 5 Blatchf. 414; Fed. Cas. No. 6369); and if there is competent testimony his decision cannot be reviewed. (In re Fowler, 4 Fed. Rep. 303; In re Vandervelpen, 14 Blatchf. 137; Fed. Cas. No. 16844; In re Wiegand, 14 Blatchf. 370; Fed. Cas. No. 17618; In re Wahl, 15 Blatchf. 334; Fed. Cas. No. 17041.) If the commitment is improper the party may be remanded, that proceedings de novo may be taken before the commissioner (In re Farez, 7 Blatchf. 345; Fed. Cas. No. 4645); but he may be released if the warrant is void. (In re Farez, 7 Blatchf. 345; Fed. Cas. No. 4645.) So if the commitment is irregular the court may discharge the prisoner from it, but may commit him de novo if there is sufficient evidence for that purpose. (Ex parte Bennett, 2 Cranch C. C. 612; Fed. Cas. No. 1311). A judgment of deportation of a Chinese person by a court having jurisdiction cannot be impeached on habeas corpus by proof of a different state of facts from that on which the judg-

ment was based. (In re Gut Lun, 83 Fed. Rep. 141.) The question of the citzenship of a Chinese person may be determined by the courts. (In re Tom Yum, 64 Fed. Rep. 485.) Under the act of Congress of February 5, 1867 (14 Stat. 385), the court or judge shall proceed in a summary way to determine the facts of the case on habeas corpus; and if the petitioner is deprived of liberty in contravention of the constitution or laws of the United States, he shall forthwith be discharged. (Cunningham v. Neagle, 135 U. S. 1; Ex parte Medley, 134 U. S. 160.) Where a prisoner is held in a State court to answer for necessarily killing the assailant of one whom it is his legal duty to protect, he cannot be guilty of a crime under the State law which justifies the protection of the life of another. (Cunningham v. Neagle, 135 U. S. 1.) A recital in a warrant that the person is a fugitive from justice will be taken as true until overcome by satisfactory proof in habeas corpus proceedings for the discharge of a person held under an extradition warrant issued by the governor. (In re Bloch, 87 Fed. Rep. 981.) Upon a writ of habeas corpus to procure the release of a person who has been committed for contempt in refusing to answer questions the court may consider the testimony and the facts on which the committing court acted. (Ex parte Irvine, 74 Fed. Rep. 954.) It may be shown on habeas corpus that a warrant of removal issued by a governor is invalid by reason of the insufficiency of the requisition papers on which it was issued. (Ex parte Harte, 25 U. S. App. 22; 63 Fed. Rep. 249.) A court may not look into a bill of exceptions on habeas corpus proceedings collaterally attacking the judgment. (In re Haskell, 52 Fed. Rep. 795.) The circuit court cannot determine on a writ of habeas corpus whether a certain scheme is a lottery. (Horner v. United States, 143 U. S. 570.) Judgments of courts, whether Fed-

eral or State, cannot be treated as void and attacked collaterally on habeas corpus. (In re Swan, 150 U. S. 637.) The circuit courts have no jurisdiction as parens patriae to determine upon habeas corpus the custody of an insane person, where the question of such custody is one of discretion as to the place and character of the confinement and not of the legality of any restraint. (King v. McLean Asylum, 21 U. S. App. 481; 64 Fed. Rep. 331.)

Question of jurisdiction.—The inquiry on habeas corpus is one of jurisdiction. (Delgado v. Chavez, 140 U. S. 586; In re Belt, 159 U. S. 95; In re Marsh, 51 Fed. Rep. 277; In re Albert Frederich, 149 U. S. 70.) It is an inquiry into the legality of the detention, and is a new suit to enforce a civil right, where he claims his liberty under the Constitution and a treaty of the United States. (Ex parte Tom Tong, 108 U. S. 556.) As where one is in custody, under an order in excess of the jurisdiction. (Ex parte Rowland, 104 U. S. 604; 26 L. ed. 861; Ex parte Fisk, 113 U. S. 713; In re Nielsen, 131 U. S. 176.) The writ may be used to obtain a discharge from imprisonment under an order of a court which does not possess jurisdiction. (In re Terry, 128 U. S. 289.) A person will not be discharged on the ground of want of jurisdiction, where there is fair reason to believe that the court has jurisdiction, and there is no jurisdiction in any other court. (In re Jackson, 40 Fed. Rep. 372.) In habeas corpus proceedings to review the sentence of a court martial the only questions that can be inquired into are as to the jurisdiction of the court over the person and offense charged, and whether it acted within the scope of its lawful powers. (In re Crain, 84 Fed. Rep. 788; Johnson v. Sayre, 158 U. S. 109.) The questions which can be presented upon the writ of habeas corpus to review the decision of a United States Commissioner relate to the jurisdiction of the commis-

sioner and the legality of his order (In re Li Sing, U. S. App.: 86 Fed. Rep. 896; In re Adutt, 55 Fed. Rep. 376; In re Bryant, 80 Fed. Rep. 282); and in reviewing the decision of a collector, denying to a Chinese person admission to the United States, the court may examine all the facts and circumstances before the collector. (United States v. Chung Shee, 44 U. S. App. 751; 76 Fed. Rep. 951.) Under the sundry civil appropriation act of August, 1894, the only questions into which a court can inquire upon habeas corpus seeking the discharge of the relator from restraint by the collector of customs are whether the relator is an alien, and whether the collector has made a decision. (In re Chin Yuen Sing, 65 Fed. Rep. 571.)

Discharge on writ.—Where one is in custody for acts done in pursuance of the Constitution and laws of the United States, he should be discharged from custody under the writ. (Ex parte Royall, 117 U. S. 241; In re Loney, 134 U. S. 372; In re White, 43 Fed. Rep. 913; 45 Fed. Rep. 237; In re Beine, 42 Fed. Rep. 545; Ex parte McClusky, 40 Fed. Rep. 71; In re Shaner, 39 Fed. Rep. 869; In re Neagle, 135 U. S. 1.) A duty imposed upon a marshal is a law, within the meaning of the statute providing for the writ of habeas corpus. (In re Neagle, 39 Fed. Rep. 833.)

If a certificate granted by a commissioner was issued without authority of law, the party held under it may be released (Ex parte Davis, 14 Law Rep. 301; Fed. Cas. No. 3613); so where a party has been arrested under a treasury warrant issued without authority (Ex parte Randolph, 2 Brock. 447; Fed. Cas. No. 11558); so if the sentence of a court is void, as being in excess of its authority (Ex parte Lange, 18 Wall. 163); so if a military commission imposes a sentence not authorized by law (Ex parte Hewitt, 3 Am. Law Rev. 382; Fed. Cas. No. 6442); so if a court-martial proceeds against a party without notice its

sentence is void, and the party may be released (Meade v. Deputy Marshal, 1 Brock. 324; Fed. Cas. No. 9372); but if a court-martial has jurisdiction, a party held for trial cannot be released (In re Bogart, 2 Saw. 396; Fed. Cas. No. 1596); nor can its judgment be collaterally impeached for irregularities. (Ex parte Reed, 100 U. S. 13.) If the statute under which a party is indicted is unconstitutional, it cannot be a legal cause of imprisonment (Ex parte Siebold, 100 U. S. 371); and the appellate court may give relief without waiting for an appeal or writ of error. (Ex parte Siebold, 100 U. S. 371.) If a party under sentence has received a pardon, he may be released under this writ. (Ex parte Greathouse, 4 Saw. 487; Fed. Cas. No. 5741.) A discharge from the process under which he is imprisoned discharges him from confinement under that process alone. (Ex parte Milburn, 9 Peters, 704.) A person imprisoned under a sentence for a longer time than the court had power to impose can be released on habeas corpus. (Re Monroe, 46 Fed. Rep. 52; but see In re Swan, 150 U. S. 637.) So where process is void, he may be released on the ground that he is deprived of liberty without due process of law (Re Monroe, 46 Fed. Rep. 52); or where the court had no jurisdiction of the offense. Re Coy, 127 U. S. 731.) So a second conviction and punishment for the same offense is an excess of authority. (Re Nielsen, 131 U. S. 176.) A person imprisoned for an alleged contempt may be released if the act was not forbidden by any order of court at the time, but which the court afterward made nunc pro tunc. (Ex parte Buskirk, 25 U. S. App. 613; 72 Fed. Rep. 14.) A judgment of a Federal court discharging on habeas corpus a Chinese immigrant from detention on board a vessel, and permitting her to land is conclusive as to her right to come into this country. (United States v.

Chung Shee, 71 Fed. Rep. 277; 44 U. S. App. 751; 76 Fed. Rep. 951.) A judgment of acquittal by the courts of the United States under the laws will, as to the issues involved, protect the relators from prosecution or molestation elsewhere. (Kelly v. State of Georgia, 68 Fed. Rep. 652.) The fact that an officer of the United States sought to be held in a State court for punishment for acts done in performance of his duty to the United States, may raise the question of his immunity in the State court, is not sufficient reason for a Federal court to refuse to release him on habeas corpus. (In re Waite, 81 Fed. Rep. 359.) A witness arrested while coming into a State to testify in obedience to a subpoena from a Federal court will be released. (United States v. Baird, 85 Fed. Rep. 633.)

When not released.—If a court holding a party under sentence had jurisdiction, he cannot be released merely for errors in the proceedings (Ex parte Parks, 93 U. S. 18; Ex parte Siebold, 100 U. S. 371; In re Callicot, 8 Blatchf. 89; Fed. Cas. No. 2323; Ex parte Watkins, 3 Peters, 193; Ex parte Shaffenburg, 4 Dill. 271; Fed. Cas. No. 12696; Johnson v. U. S., 3 McLean, 89; Fed. Cas. No. 7418), although the indictment alleges the commission of the crime more than two years before commencement of the prosecution (Johnson v. United States, 3 McLean, 89; Fed. Cas. No. 7418), or although it does not show any offense cognizable by such court. (Ex parte Watkins, 3 Peters, 193.) If a party has been committed for a contempt, inquiry cannot be made into the sufficiency of the cause of commitment. (Ex parte Kearney, 7 Wheat. 38.) A person imprisoned for contempt in violating an injunction cannot be released because the necessary jurisdictional facts do not appear on the face of the pleadings in the injunction case. (In re Eaton, 51 Fed. Rep. 804.) The decision of one

court or judge upon a return of the writ will not bar successive applications for discharge under the writ of habeas corpus. (Ex parte Kaine, 3 Blatchf. 1; Fed. Cas. No. 7597.) An extradition warrant ought not to be pronounced void merely because of some technical defect in the foreign indictment or affidavit. (Webb v. York, 79 Fed. Rep. 616.) Refusal of a State court to assign counsel to the prisoner, and forcing him to trial without compulsory process to secure witnesses cannot be considered by a Federal court on habeas corpus proceedings. (In re McKnight, 52 Fed. Rep. 799.) A prisoner cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence as it was within the power of the court to impose (Re Swan, 150 U. S. 637), or unless it is affirmatively shown that the judgment or sentence under which the petitioner is confined is void, he is not entitled to his discharge. (United States v. Pridgeon, 153 U. S. 48.) A prisoner committed on a criminal charge will not be released merely because he was brought back from another State as a fugitive from justice by means of extradition warrants procured by false affidavits. (In re Moore, 75 Fed. Rep. 821.) A hearing and discharge upon an application for committal to jail is no ground for discharge on habeas corpus from imprisonment under an indictment. (Whitten v. Tomlinson, 160 U. S. 231.) Error of a State court in denying a stay of execution in a capital case, because of a pending appeal to a Federal court, is not ground for setting the prisoner at liberty on habeas corpus, when that judgment has been superseded by the supreme court of the State, and further proceedings have been taken in the State courts. (In re Boardman, 169 U. S. 39.) The discharge on habeas corpus of a person arrested on a warrant of a State court as a fugitive from the jus-

tice of a State of which he is a native born citizen, when claimed on the ground that he holds a consular office, may be denied by a Federal court where his consular office has terminated at the date of the order of denial, although it existed at the time of his arrest and when the petition for the writ was filed. (Iasigi v. Van De Carr, 166 U. S. 391.)

§ 370. **In cases involving the law of nations.**—When a writ of *habeas corpus* is issued in the case of any prisoner who, being a subject or citizen of a foreign State, and domiciled therein, is committed or confined or in custody, by or under the authority or law of anyone of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceedings to be prescribed by the court or justice or judge at the time of granting said writ shall be served on the attorney general or other officer prosecuting the pleas of said State, and due proof of such service shall be made to the court or justice or judge before the hearing. (Rev. Stats. sec. 762.)

§ 371. **Appeals to circuit court.**—From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of *habeas corpus*, or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard.

1. In the case of any person alleged to be restrained of his liberty in violation of the constitution or of any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign State, and domiciled therein, is committed or confined or in custody, by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. (Rev. Stats. sec. 763.)

The appellate jurisdiction, formerly exercised by the circuit courts under this section, now belongs to the circuit courts of appeals under sections four to six of the act of March 3, 1891. (United States v. Fowkes, 53 Fed. Rep. 13, 14; King v. McLean Asylum, 64 Fed. Rep. 325. See Cross v. Burke, 146 U. S. 82, 86; In re Lennon, 150 U. S. 393, 398; Clarke v. McDade, 165 U. S. 168, 170; Ex parte Jugiro, 44 Fed. Rep. 754.)

§ 372. **Appeal to supreme court.**—From the final decision of such circuit court an appeal may be taken to the supreme court in the cases described in the preceding section. (Rev. Stats. sec. 764; as amended, 23 U. S. Stats. 437.)

Appeal.—No appeal lies to the supreme court from an order of a circuit judge, sitting as such and not as a court, discharging a prisoner brought before him on a writ of habeas corpus (Carper v. Fitzger-

ald, 121 U. S. 87. See Ex parte Royall, 112 U. S. 181); neither will an appeal lie from an order of a circuit judge refusing to issue a writ of habeas corpus after a hearing at chambers. (In re King, 51 Fed. Rep. 434; Lambert v. Barrett, 157 U. S. 697.) Since the amendment of section 764 of the Revised Statutes, so as to give this court jurisdiction, upon appeal, to review the final decisions of the circuit court of the United States in cases of habeas corpus, the right to the writ, upon original application to this court is not, in every case, an absolute one. (Wales v. Whitney, 114 U. S. 564; 29 L. ed. 277; Ex parte Royall, 117 U. S. 241, 250; Ex parte Terry, 128 U. S. 289.) A final order of the circuit court at a stated term, dismissing a writ of habeas corpus and remanding the prisoner to the custody of the marshal for trial, is appealable to this court. (In re Palliser, 136 U. S. 256.) The supreme court may, by means of the writ of certiorari, review the judgments of the circuit courts of appeals in habeas corpus cases. (Lau Ow Bew v. U. S., 144 U. S. 47.) Pending an appeal from a refusal to grant the writ in behalf of a person confined under sentence of a State court, the custody of the prisoner cannot be disturbed. (In re McKane, 61 Fed. Rep. 205.) The question whether good cause is shown for a prisoner's discharge is to be judicially determined by the judge, and his determination can be reviewed by appeal, but not by mandamus. (Commonwealth of Virginia v. Paul, 148 U. S. 107.) The rule that a writ of habeas corpus cannot be used to perform the office of a writ of error applies not only to original writs of habeas corpus issued by the supreme court, but also to appeals to it from courts below in habeas corpus proceedings. (Gonzales v. Cunningham, 164 U. S. 612.) That a prisoner should not be admitted to bail pending an appeal from a denial of the writ, whether the court is pro-

hibited from so doing or not. (In re Chin Yuen Sing, 65 Fed. Rep. 788.) As to when a prochein ami of an insane person may prosecute an appeal from an order of a circuit court remanding the insane person to an asylum, see King v. McLean, 21 U. S. App. 407; 64 Fed. Rep. 325. Where an appeal has been taken from an order of a Federal court denying a writ of habeas corpus to release one convicted of a capital crime by a State court, and the order has been in fact affirmed, the State court is not required before proceeding to order the execution, to await the filing in the Federal court of the supreme court mandate. (In re Durrant, 84 Fed. Rep. 314.) The supreme court may on an appeal in a habeas corpus case review both law and fact. (Johnson v. Sayre, 158 U. S. 109.)

§ 373. **Appeals, how taken.**—The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings as may be prescribed by the supreme courts, or, in default thereof, by the court or judge hearing the cause. (Rev. Stats. sec. 765.)

How taken.—The provisions of this section do not violate the seventh amendment to the Constitution. (McElrath v. U. S., 102 U. S. 426.) Under the Revised Statutes and the rules of the supreme court, the allowance of an appeal by a circuit or district court, or by some judge thereof or of the supreme court, is necessary to the perfection of an appeal; and if an order of allowance is denied by the court, the party

desiring to appeal must apply either to some of the other judges named for the allowance, or to the supreme court for a writ of mandamus in aid of its appellate jurisdiction. (In re Durrant, 84 Fed. Rep. 317.) Citation is not required when the appeal is taken in open court during the term at which the decree is entered; aliter where at a subsequent term the appeal is allowed, although the solicitors of the appellee be present. (Railroad Co. v. Blair, 100 U. S. 661.) The appeal will not, however, be dismissed in the latter case, but terms will be imposed upon the appellant. (Dayton v. Lash, 94 U. S. 112; Railroad Co. v. Blair, 100 U. S. 661.) The appeal must be in writing and filed with the clerk, and when afterward the bond is given, the appeal is perfected. (Winslow v. Wilcox, 12 Fed. Rep. 352.) A district judge, who has denied a writ of habeas corpus to release a foreign consul imprisoned under State authority, has no power under this section and rule 34, supreme court, to admit the prisoner to bail pending an appeal from the order denying the writ. (In re Iasigi, 79 Fed. Rep. 755.) No bill of exceptions is necessary on appeal from the order of a district judge in a habeas corpus case. (Solomon v. Davenport, U. S. App. 87 Fed. Rep. 318.)

§ 374. Pending proceedings—Action by State authority void.—Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas*

corpus, shall be deemed null and void; *provided,* that no such appeal shall be had or allowed after six months from the date of the judgment or order complained of. (Rev. Stats. sec. 766; as amended 27 U. S. Stats. 751.)

Jurisdiction of the State court under this section is restrained only pending the proceeding in the courts of the United States on habeas corpus, and until final judgment therein. (In re Shibuya Jugiro, 140 U. S. 291.) A judgment of the supreme court of the United States affirming a judgment of the circuit court denying a habeas corpus to review the judgment of a State court in a criminal case is a final judgment within this section. (In re Shibuya Jugiro, 140 U. S. 291.) Under this section an order of the State court, directing the infliction of the death penalty pending an appeal from the order of the district court denying a writ of habeas corpus, is invalid (In re Ebanks, 84 Fed. Rep. 311); but if the order of the district court has been in fact affirmed on appeal the State court is not required before proceeding to order the execution to await the filing in the Federal court of the supreme court mandate. (In re Boardman, 169 U. S. 39.) The fact that a prisoner is daily required to perform hard labor pending the appeal gives no authority under this section for any interference on a subsequent application for the writ. (In re McKane, 61 Fed. Rep. 205.)

CHAPTER XIX.

EVIDENCE.

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§ 413. Copies of foreign letters patent.
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§ 430. Revised Statutes.
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§ 432. Possessory actions for recovery of mining titles.

§ 375. No witness excluded on account of color or interest.—In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; *provided*, that in actions by or against executors, administrators, or guardians, in which judgment

may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty. [See Rev. Stats. sec. 1977.] (Rev. Stats. sec. 858.)

Competency of witnesses.—The competency of parties to testify as to transactions with decedent in actions against personal representatives is to be determined by this section rather than by State laws (Page v. Burnstine, 102 U. S. 664; De Beaumont v. Webster, 39 U. S. App. 713; 81 Fed. Rep. 535; Morris v. Norton, 43 U. S. App. 739; 75 Fed. Rep. 912); and the objection to the competency of a witness is disposed of under this section. (Nat. Bank v. Potter, 102 U. S. 163; Beardsley v. U. S., 3 Morr. Trans. 541.) The testimony of parties is not to be excluded in suits by or against administrators, except as to transactions with or statements by deceased. (De Beaumont v. Webster, 39 U. S. App. 713; 81 Fed. Rep. 535.) The husband of a deceased person defending an action as her executor is not precluded from testifying to incidents occurring with third parties to the benefit of deceased as to which, if living she could not have given testimony to contradict his. (Hinchman v. Parlin & Orendorf Co., 41 U. S. App. 301; 74 Fed. Rep. 698.) This section does not apply to territorial courts (Good v. Martin, 95 U. S. 90); but it applies to courts of the District of Columbia. (Noerr v. Brewer, 1 McAr. 507.) This section applies to trials in which

the United States is a party. (Green v. United States, 9 Wall. 655; but see Jones v. United States, 1 Ct. of Cl. 383.) It is remedial, and its language should be construed accordingly. (Texas v. Chiles, 21 Wall. 488.) A party may testify either orally or by deposition. (Cornett v. Williams, 20 Wall. 226.) This section applies to a case where a party offers to testify on his own behalf (Texas v. Chiles, 21 Wall. 488; Railroad Co. v. Pollard, 22 Wall. 341); but an application for an order to testify in one's own behalf must not be granted if it would adopt a rule of decision different from that which the legislature of the State has prescribed for State courts in similar cases. (Robinson v. Mandell, 3 Cliff. 169; Fed. Cas. No. 11959.) A husband is a competent witness to testify as to a claim in favor of his wife (In re Campbell, 3 Hughes, 276; Fed. Cas. No. 2348; Green v. Taylor, 3 Hughes, 400; Fed. Cas. No. 5761); and she is a competent witness in an action for damages for injury to her if made so under the laws of the State (Packet Co. v. Clough, 20 Wall. 528); but at common law a wife cannot testify in favor of her husband. (Lucas v. Brooks, 18 Wall. 436.) This section applies to the courts of the District of Columbia. (Page v. Burnstine, 102 U. S. 664.) No witness can be excluded because he is a party to or interested in the issue tried. (King v. Worthington, 3 Morr. Trans. 101; Potter v. National Bank, 102 U. S. 163; Railroad Co. v. Koontz, 104 U. S. 5; Texas v. Chiles, 21 Wall. 488; Nash v. Williams, 20 Wall. 226; N. J. R. Co. v. Pollard, 22 Wall. 877; The Argo, 2 Wheat 287.) The proviso of this section excludes only parties to the issue from testifying as to transactions with a deceased person in an action against his executor, etc. (Potter v. Third Nat. Bank of Chicago, 102 U. S. 163; Monongahela Nat. Bank v. Jacobus, 109 U. S. 275.) In an action against executors for advances made to their testator on goods con-

signed, testimony of plaintiff as to his efforts to sell the goods, the prices obtained and the correctness of charges made should not have been excluded under the proviso of this section. (Steiner v. Eppinger, 23 U. S. App. 344; 61 Fed. Rep. 253.) The exception cannot be extended so as to exclude parties from testifying in their own behalf against assignees in bankruptcy. (Hobbs v. McLean, 117 U. S. 567.) In the United States courts no witness can be excluded in any civil action because he is a party to or interested in the issue tried. (Potter v. Third Nat. Bank of Chicago, 102 U. S. 163; Bradley v. United States, 104 U. S. 442.) And this rule applies to trials in which the United States is a party. (Green v. United States, 9 Wall. 655.) Parties to the record may testify like other witnesses, either orally or by deposition. (Nash v. Williams, 20 Wall. 226.) Their testimony, in a proper case, may be taken by depositions de bene esse (Nash v. Williams, 20 Wall. 226; New Jersey R. R. & Trans. Co. v. Pollard, 22 Wall. 341; Lowry v. Kusworm, 66 Fed. Rep. 538); and the deposition of one party may be taken in behalf of another. (Texas v. Chiles, 21 Wall. 488.) Under section 34 of the judiciary act, a party to a suit in the circuit court in Ohio must be admitted as a witness in his own behalf, being competent as such in the State courts. (Wright v. Bales, 2 Black, 535; Vance v. Campbell, 1 Black, 427; Ryan v. Bindley, 1 Wall. 66.) This section, relating to the competency of parties as witnesses, applies to the District of Columbia as fully as to the circuit and district courts of the United States. (Page v. Burnstine, 102 U. S. 664, cited in McAllister v. United States, 141 U. S. 174.) Though bills of discovery are not now as necessarily and commonly resorted to as formerly, yet discovery is still permissible. (National etc. Co. v. Interchangeable etc. Brake Beam Co., 83 Fed. Rep. 26.)

Parties to suit.—A party merely having an interest in the suit is a competent witness, although one of the parties is an executor (Potter v. Third Nat. Bank, 13 Chic. L. N. 102); but where an administrator is a party, the opposite party is not competent to testify unless called by the administrator or required to testify by the court. (James v. Atlantic Delaine Co., 3 Cliff. 614; Fed. Cas. No. 7177.) The opposite party is that party against whom the evidence is sought to be used. (Eslava v. Mazauge, 1 Woods, 623; Fed. Cas. No. 4527.) This section does not contemplate an ex parte order permitting a party to testify. (Eslava v. Mazauge, 1 Woods, 623; Fed. Cas. No. 4527.) A bill in equity for a discovery merely is unnecessary, as a party may be examined as a witness (Heath v. Erie Railway Co., 9 Blatchf. 316; Fed. Cas. No. 6307); and admissions of a party are competent against him, although he testified in the case, and was not asked whether he made them or not. (The Stranger, 1 Brown Adm. 281; Fed. Cas. No. 13525.) It is for the court to suggest that a party be called in special cases. (Eslava v. Mazauge, 1 Woods, 623; Fed. Cas. No. 4527.) If a party dies after his testimony has been taken, the adverse party may be examined if the administrator insists. (Mumm v. Owens, 2 Dill. 475; Fed. Cas. No. 9919. See Jerman v. Stewart, 12 Fed. Rep. 275.) Congress intended no more than to restore the common-law rule of evidence. (United States v. Clark, 96 U. S. 42.) A party interested in the issue but not a party to the suit is competent to testify as to statements of the testator. (Porter v. Nat. Bank, 102 U. S. 163.)

State laws followed as to competency of witnesses.—Under the last clause of this section a State statute prohibiting physicians and others from testifying as to confidential communications made to them in a professional capacity is binding upon a Federal court

sitting within that State. (Mutual Benefit Life Ins. Co. v. Robinson, 19 U. S. App. 266; 58 Fed. Rep. 723.) The provision of the section that the laws of the State as to competency of witnesses shall be controlling has no application to criminal trials. (Logan v. United States, 144 U. S. 263; United States v. Hall, 53 Fed. Rep. 352.) In the absence of special provision by Congress, the competency of witnesses in criminal cases is to be determined by the law of the State as it existed when the judiciary act of 1789 was passed. (United States v. Hall, 53 Fed. Rep. 352.) This section contains the whole law governing the courts of the United States in respect to the competency as witnesses of interested parties, and no State statute can annex any further qualifications to its provisions. (De Beaumont v. Webster, 71 Fed. Rep. 226.) A provision in a State statute excluding as against the heir or representative of a decedent the testimony of one who has acted as an agent in making or continuing a contract with such decedent is binding on a Federal court. (Continental Nat. Bank v. Heilman, 81 Fed. Rep. 36.)

§ 376. **Defendants in criminal cases as witnesses.**—That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (20 U. S. Stats. 30.)

§ 377. **Testimony before Congress.**—No testimony given by a witness before either house, or before any committee of either house of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege. (Rev. Stats. sec. 859.)

§ 378. **Pleadings, disclosures, etc.**—No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *provided*, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid. (Rev. Stats. sec. 860.)

Note.—Section partly repealed by act of June 22, 1874, sec. 5 (18 Stats. 186). (United States v. Three Tons, 6 Biss. 379; Fed. Cas. No. 16515; United States v. Distillery, 6 Biss. 483; Fed. Cas. No. 14966.) The books and papers of a party taken from him are competent evidence against him (United States v. Distillery, 1 Hughes, 533; Fed. Cas. No. 14961; United States v. Hughes, 12 Blatchf. 553; Fed. Cas. No. 15417); but he cannot be required to produce the books and papers which will subject him to the penalty. (Johnson v. Donaldson, 3 Fed. Rep. 22; 18 Blatchf. 287.) An affidavit made by defendant to

procure the summoning and payment by the United States of witnesses in his behalf is not a pleading of defendant nor a discovery or evidence obtained from him by a judicial proceeding within this section. (Tucker v. United States, 151 U. S. 164.) The provision of the above section does not neutralize or modify the right of protection secured to the witness by the fifth amendment to the constitution. (Ex parte Irvine, 74 Fed. Rep. 955.)

§ 379. **Proof in common-law actions.**—The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided. (Rev. Stats. sec. 861.)

Note.—Open court means in presence of the court and jury at the trial. (Beardsley v. Littell, 14 Blatchf. 102; Fed. Cas. No. 1185.) This section does not refer to discovery. (Bryant v. Leyland, 6 Fed. Rep. 125. See Ex parte Fisk, 113 U. S. 713.)

§ 380. **Proof in equity and admiralty causes.**—The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court, except as herein especially provided. (Rev. Stats. sec. 862.)

Note.—This section does not expressly repeal the act (1 Stat. 88) in relation to oral examination of witnesses. (Blease v. Garlington, 92 U. S. 1.)

§ 381. **Notaries may take depositions, acknowledgments, etc.**—Notaries public of the several States, Territories, and the District of Columbia are hereby authorized to take depositions, and

do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do. (1876; 19 U. S. Stats. 206.)

§ 381 a. Depositions may follow State usage.—In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held. (27 U. S. Stats. 7.)

Taking depositions according to State practice.—This section does not extend the right to examine parties to the cause in advance of trial. It only affects the mode of making the examination. (Despeaux v. Pennsylvania R. Co., 81 Fed. Rep. 897.) This section adopts the State practice as to the manner of taking depositions, and does not in connection with a State statute authorize the taking of defendant's deposition before trial, in the absence of any of the grounds therefor prescribed by the Revised Statutes, secs. 863, 866. (Shellabarger v. Oliver, 64 Fed. Rep. 306.) This section merely provides an additional mode of taking depositions of witnesses and obtaining answers on interrogatories in the cases already authorized, and did not confer additional rights to obtain proofs by interrogatories addressed to the adverse party in actions of law under the provisions of State statutes. (National Cash Register Co. v. Leland, 77 Fed. Rep. 242.) This section does not authorize the admission of testimony found in the steno-

graphic notes of a former trial, where the laws of the State in which the court is held allows it. (Mulcahey v. Lake Erie & W. R. Co., 69 Fed. Rep. 172.)

§ 382. **Depositions de bene esse.**—The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or a superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness, and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse

party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. (Rev. Stats. sec. 863.)

Conditions under which taken.—The conditions under which a party is permitted, and a magistrate authorized, to take depositions de bene esse under the act of 1789 are: (1) that the witness lives at a greater distance from the place of trial than one hundred miles; (2) or is bound on a voyage to sea; (3) or is about to go out of the United States; (4) or out of such district to a greater distance from the place of trial than one hundred miles, before the time of the trial; (5) or is ancient or very infirm. (Harris v. Wall, 7 How. 693; Patapsco Ins. Co. v. Southgate, 5 Pet. 604.) The liability of a witness who is a seaman on board a gunboat, to be ordered out of the reach of the court, is not a sufficient cause for taking a deposition de bene esse, under the judiciary act of 1789. (The Samuel, 1 Wheat. 9.) This section applies to equity as well as to common-law causes. (Stegner v. Blake, 36 Fed. Rep. 183.) A witness "lives" where he can be found, and is sojourning, residing, or abiding for his health or any other lawful purpose. (Mutual Benefit Life Ins. Co. v. Robison, 19 U. S. App. 266; 58 Fed. Rep. 723.)

To what applies.—The provisions of this section do not apply to depositions taken under a rule of court (Banert v. Day, 3 Wash. C. C. 243; Fed. Cas. No. 836); nor to cases pending in the supreme court. (The Argo, 2 Wheat. 287; The London Packet, 2 Wheat. 371.) The provisions of this and the succeeding section apply to the taking of depositions within the United States, and have no application to foreign countries. (Bird v. Halsy, 87 Fed. Rep. 671.) The court may issue a subpoena duces tecum to compel the production of books and papers (Ex parte Peck, 3 Blatchf. 113; Fed. Cas. No. 10885; U. S. v. Tilden, 10 Ben. 566; Fed. Cas. No. 16522); but not for the purpose merely to refresh the memory of the witness. (United States v. Tilden, 10 Ben. 566; Fed. Cas. No. 16522.) The provision for taking depositions de bene esse is still in force, the mode being that provided by equity, rule 67. (Bischoffscheim v. Baltzer, 10 Fed. Rep. 1.) The conditions under which a deposition de bene esse may be taken are, first, that the witness lives more than one hundred miles distant; second, or is bound on a sea voyage; third, or is about to leave the United States; fourth, or about to go out of the district to a distance greater than one hundred miles; fifth, or is very old or very infirm. (Harris v. Wall, 7 How. 693.) It may be taken out of the district as well as within it (Patapsco Ins. Co. v. Southgate, 5 Pet. 604; but see Evans v. Hettick, 3 Wash. C. C. 408; Fed. Cas. No. 4562; Bleecker v. Bond, 3 Wash. C. C. 529; Fed. Cas. No. 1534; United States v. Tilden, 25 Int. Rev. Rec. 352; Ex parte Humphrey, 2 Blatchf. 228; Fed. Cas. No. 6867); and a second deposition of the same witness may be taken without an order of court. (Cornett v. Williams, 20 Wall. 226.) Before the subpoena is issued evidence should be produced to show that the case is one in which such examination can be had. (Ex parte

Peck, 3 Blatchf. 113; Fed. Cas. No. 10885.) Defendant may examine plaintiff de bene esse, even before issue joined, where plaintiff resides out of the district and more than one hundred miles from the place of trial. (Lowrey v. Kusworm, 66 Fed. Rep. 539.) A witness casually absent cannot be compelled to appear and testify at the place where he is sojourning. (Ex parte Humphrey, 2 Blatchf. 228; Fed. Cas. No. 6867.) So if he resides more than one hundred miles distant he cannot be compelled to testify before an officer in the district where he resides. (Henry v. Ricketts, 1 Cranch C. C. 580; Fed. Cas. No. 6386.) The liability of a witness to be ordered out of the reach of the court is not sufficient for taking a deposition de bene esse. (The Samuel, 1 Wheat. 9.) A party may apply for a dedimus, and cause testimony to be taken of the dedimus so stated, orally. (Egbert v. Citizens' Ins. Co., 7 Fed. Rep. 51; 2 McCrary, 386.) A commissioner under a dedimus potestatem may be an officer of any kind, or any one not an officer, and is not within this section. (Jerman v. Stewart, 12 Fed. Rep. 273.) A deposition is admissible in evidence in a suit brought by the United States under the contract labor law. (Moller v. United States, 13 U. S. App. 472; 57 Fed. Rep. 490.) A deposition properly taken under this section will not be suppressed upon the sole ground that it was taken during a term at which the case might be tried. (Union Pac. Ry. Co. v. Reese, 15 U. S. App. 92; 56 Fed. Rep. 288). The authority to take testimony de bene esse must be strictly construed, and all requisites of law must be complied with before such testimony is admissible (Bell v. Morrison, 1 Pet. 351; Harris v. Wall, 7 How. 693; Carrington v. Stimson, 1 Curt. 437; Fed. Cas. No. 2450; Allen v. Blunt, 2 Wood. & M. 121; Fed. Cas. No. 217; Jones v. Neale, 2 Mart. (N. C.) 81); 1 Hughes, 268; Fed. Cas. No. 7483); and there must be di-

rect proof that the requirements of the statute were complied with. (Bell v. Morrison, 1 Pet. 351.) Depositions not taken according to the rules of law of the Federal courts are not admissible, though taken according to the rules of practice of the State courts. (Evans v. Eaton, 7 Wheat. 356; Evans v. Hettick, 3 Wash. C. C. 408; Fed. Cas. No. 4562.) They cannot be used in a case in equity (Walker v. Parker, 5 Cranch C. C. 639; Fed. Cas. No. 17082); as under this section they can be taken without a commission. (Pettibone v. Derringer, 4 Wash. C. C. 215; Fed. Cas. No. 11043.) The provisions of this section should never be resorted to, except in cases of absolute necessity. (Walsh v. Rogers, 13 How. 283.) It may be taken before a probate court if it is a court of record (Fowler v. Merrill, 11 How. 375); or before any county judge (Voce v. Lawrence, 4 McLean, 203; Fed. Cas. No. 16979); or before a commissioner of the circuit court (Whitney v. Huntt, 5 Cranch C. C. 120; Fed. Cas. No. 17589); or a notary public (Dinsmore v. Maroney, 4 Blatchf. 416; Fed. Cas. No. 3920); but not before a township justice (Shutte v. Thompson, 15 Wall. 151); or a judge of a county commissioner's court (Garey v. Union Bank, 3 Cranch C. C. 91; Fed. Cas. No. 5241); or a judge of the city court. (Foreman v. Holmead, 5 Cranch C. C. 162; Fed. Cas. No. 4935.) A commissioner cannot issue the writ of habeas corpus for the purpose of taking the deposition of the prisoner. (Ex parte Barnes, 1 Sprague, 133; Fed. Cas. No. 1010.) Depositions de bene esse taken pursuant to this section may be opened before the trial by order of court upon motion of one party and against the objection of the other party. (United States v. Tilden, 10 Ben. 170; Fed. Cas. No. 16520; see United States v. Hall, 44 Fed. Rep. 883.) A deposition taken under this section cannot be used against objection, when it appears that the witness is ac-

tually present in court, ready and able to testify if called. (Whitford v. Clark County, 119 U. S. 522.)

Notice to adverse party.—Reasonable notice must be given to the adverse party (Egbert v. Citizens' Ins. Co., 7 Fed. Rep. 51); taken without notice to the adverse party cannot be used if such adverse party or his attorney is within one hundred miles (The Sailor's Bride, 1 Brown Adm. 68; Fed. Cas. No. 12220; Pentleton v. Forbes, 1 Cranch C. C. 507; Fed. Cas. No. 10966; Dunlop v. Monroe, 1 Cranch C. C. 536; Fed. Cas. No. 4167; Allen v. Blunt, 2 Wood. & M. 121; Fed. Cas. No. 217); or if the adverse party is temporarily within that distance. (Dick v. Runnels, 5 How. 7.) What constitutes reasonable notice depends upon such circumstances as distance, number of witnesses, and facility of communication to obtain representation at the taking. (American Exch. Nat. Bank v. First Nat. Bank, 82 Fed. Rep. 961.) If a known attorney is within that distance, notice must be given to him though he be not attorney of record (Allen v. Blunt, 2 Wood. & M. 121; Fed. Cas. No. 217); and where there is an attorney of record notice must in all cases be given to him (Leiper v. Bickley, 1 Cranch C. C. 29; Fed. Cas. No. 8222; Barrell v. Limington, 4 Cranch C. C. 70; Fed. Cas. No. 1040; The Argo, 2 Gall. 314; Fed. Cas. No. 517); and in all cases where the United States is a party, notice must be given to the district attorney (The Argo, 2 Gall. 314; Fed. Cas. No. 517); but if neither the party nor his attorney are within a hundred miles no notice need be given. (Dick v. Runnels, 5 How. 7; Miller v. Young, 2 Cranch C. C. 53; Fed. Cas. No. 9596; Voce v. Lawrence, 4 McLean, 203; Fed. Cas. No. 16979.) Parol evidence is admissible to prove the party or his attorney was within the distance. (Dick v. Runnels, 5 How. 7.) The notice should be given by the party proposing to take

the deposition. (Young v. Davidson, 5 Cranch C. C. 515; Fed. Cas. No. 18157.) If the deposition was taken without notice, the adverse party may have it taken again (Goodhue v. Bartlett, 5 McLean, 186; Fed. Cas. No. 5538); or if he objects on that ground, the party who offers the deposition may show that neither he nor his attorney were within one hundred miles at the time. (Smith v. Coleman, 2 Cranch C. C. 237; Fed. Cas. No. 13029; see Brooks v. Jenkins, 3 McLean, 432; Fed. Cas. No. 1953.) If the certificate states facts which make it unnecessary to give notice, it need not state that those facts were the reason no notice was given. (Dinsmore v. Maroney, 4 Blatchf. 416; Fed. Cas. No. 3920; see Shutte v. Thompson, 15 Wall. 151.)

What notice to contain.—The notice should show on its face that the contingency has happened which gives the right to the party to take the deposition (Harris v. Wall, 7 How. 693; but see Debutts v. McCulloch, 1 Cranch C. C. 286; Fed. Cas. No. 3718; Sage v. Tauszky, 6 Cent. L. J. 7; Fed. Cas. No. 12214); and the time and place of taking the deposition (Dunlop v. Munroe, 1 Cranch. C. C. 536; Fed. Cas. No. 4167); and the name of the witness (Carrington v. Stimson, 1 Curt. 437; Fed. Cas. No. 2450); and if it notifies that it will be taken between certain hours, it may be taken any time before the last hour named (House v. Cash, 2 Cranch C. C. 73; Fed. Cas. No. 6736); and an hour's notice of the time and place, under special circumstances is sufficient (Leiper v. Bickley, 1 Cranch C. C. 29; Fed. Cas. No. 8222; Bowie v. Talbot, 1 Cranch C. C. 247; Fed. Cas. No. 1732; Atkinson v. Glenn, 4 Cranch C. C. 134; Fed. Cas. No. 610); but if the notice is not reasonable, and no necessity exists for a short notice, the deposition cannot be read. (Jamieson v. Willis, 1 Cranch C. C. 566; Fed. Cas. No. 7204; Renner v. Howland, 2 Cranch C. C. 441;

Fed. Cas. No. 11700.) If the surname is given in the caption to the notice and deposition, it is sufficient. (Claxton v. Adams, 1 McAr. 496.) The notice need not require the party to put interrogatories. (Bussard v. Catalino, 2 Cranch C. C. 421; Fed. Cas. No. 2228.)

Service of notice.—The service of the notice must be personal, as no substituted service is authorized. (Carrington v. Stimson, 1 Curt. 437; Fed. Cas. No. 2450.) If served by the marshal, the magistrate should certify thereto (Harris v. Wall, 7 How. 693); and the certificate should state that notice was given. (Jones v. Knowles, 1 Cranch C. C. 523; Fed. Cas. No. 7474.) If the suit is instituted against several, if no notice is served on the one summoned, it should be given to those not summoned. (Brown v. Pratt, 2 Cranch C. C. 253; Fed. Cas. No. 2026.)

Attachment of witness.—Before an attachment will be granted it must clearly appear that the commissioner has jurisdiction, and that the witness resides more than one hundred miles from the place of trial (Ex parte Peck, 3 Blatchf. 113; Fed. Cas. No. 10885); and that the facts to which he is called to testify are material and relevant to the issue. (Ex parte Peck, 3 Blatchf. 113; Fed. Cas. No. 10885; Ex parte Judson, 3 Blatchf. 148; Fed. Cas. No. 7563.) A party moving for an attachment must file affidavits showing that witness has committed a contempt, but for merely refusing to answer an interrogatory, an attachment will not issue. (Ex parte Judson, 3 Blatchf. 148; Fed. Cas. No. 7563.)

§ 383. Mode of taking depositions de bene esse.—Every person deposing, as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined.

His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent. (Rev. Stats. sec. 864.)

Examination of witness.—A deposition will not be suppressed, although witnesses are examined on the day fixed in the notice, and on other days, to keep the notice alive till other witnesses appear (Sage v. Tauszky, 6 Cent. L. J. 7; Fed. Cas. No. 12214); but if the notary meets on Saturday, adjourns to Sunday, and then to Monday, those taken on Monday will be suppressed. (Kirkpatrick v. Balt. & Ohio R. Co., 24 Pitts. L. J. 51; Fed. Cas. No. 7847.) Where the notice states that the taking will be adjourned from day to day, a taking on a regularly adjourned day is admissible. (Knode v. Williamson, 17 Wall. 586.) If taken during the session of court, it is the duty of the party and his counsel to be in court, and be ready for trial. (Bell v. Nimmon, 4 McLean, 539; Fed. Cas. No. 1259; Allen v. Blunt, 2 Wood & M. 121; Fed. Cas. No. 217.) If taken when the attorney will be unable to reach the court at its commencement, it cannot be read. (Bell v. Nimmon, 4 McLean, 539; Fed. Cas. No. 1259.) The commissioner cannot exclude evidence on the ground that it is not pertinent. (Ex parte Judson, 3 Blatchf. 148; Fed. Cas. No. 7563. See Grand Haven First Nat. Bank v. Forest, 44 Fed. Rep. 246; In re Thomas, 35 Fed. Rep. 822.) Cross-examination of a witness does not waive objections to his competency. (Mifflin v. Bingham, 1 Dall. 272), but it waives exceptions to the regularity of his deposition. (Mechanics' Bank v. Seaton, 1 Pet. 299.) Where a witness, in obedience to the instructions of his counsel, refuses to answer, his entire deposition

will be stricken from the files. (Thompson H. El. Co. v. Jeffrey Mfg. Co., 83 Fed. Rep. 614; Bird v. Halsey, 87 Fed. Rep. 671.)

Witness to be sworn.—The witness may be sworn after the deposition is reduced to writing. (Tooker v. Thompson, 3 McLean, 92; Fed. Cas. No. 14097.) It is not sufficient to swear him to tell the whole truth touching such interrogatories as may be propounded; he must be sworn to tell the whole truth as far as he knows touching the matter in controversy between the parties (Shutte v. Thompson, 15 Wall. 151; Pendleton v. Forbes, 1 Cranch C. C. 507; Fed. Cas. No. 10966; Garrett v. Woodward, 2 Cranch C. C. 190; Fed. Cas. No. 5253; Rainer v. Haynes, Hemp. 689; Fed. Cas. No. 11536; Wilson S. M. Co. v. Jackson, 1 Hughes, 295; Fed. Cas. No. 17853; United States v. Smith, 4 Day, 121; Fed. Cas. No. 16332); and if properly sworn, it is not necessary that he be cautioned (Brown v. Pratt, 2 Cranch C. C. 253; Fed. Cas. No. 2026; Moore v. Nelson, 3 McLean, 383; Fed. Cas. No. 9791; but see Luther v. The Merritt Hunt, Newb. Adm. 4; Fed. Cas. No. 8610); but a certificate that he was cautioned, examined, and sworn is sufficient. (Edmondson v. Barrell, 2 Cranch C. C. 228; Fed. Cas. No. 4284.) If it certifies that the witness affirms from conscientious scruples of taking an oath, it is sufficient. (Elliott v. Hayman, 2 Cranch C. C. 678; Fed. Cas. No. 4388; Wilson S. M. Co. v. Jackson, 1 Hughes, 295; Fed. Cas. No. 17853.)

To be reduced to writing.—The deposition must be reduced to writing by the magistrate himself, or by the witness. (Bell v. Morrison, 1 Peters, 352; Cook v. Burnley, 11 Wall. 659; Thorpe v. Simmons, 2 Cranch C. C. 195; Fed. Cas. No. 14007; Rainer v. Haynes, Hemp. 689; Fed. Cas. No. 11536; Marstin v. McKea, Hemp. 688; Fed Cas. No. 9141; Pettibone v.

Derringer, 4 Wash. C. C. 215; Fed. Cas. No. 11043.) It must appear that the testimony was reduced to writing in the presence of the magistrate. (Edmondson v. Barrell, 2 Cranch C. C. 228; Fed. Cas. No. 4284; Rainer v. Haynes, Hemp. 689; Fed. Cas. No. 11536.) If the witness copies the deposition from a paper prepared by him, it is sufficient. (United States v. Smith, 4 Day, 121.) The deposition must be signed by the witness. (Thorpe v. Simmons, 2 Cranch C. C. 195; Fed. Cas. No. 14007.) A deposition taken down stenographically in questions and answers and not reduced to writing in the presence of the witness, nor read over to or by him, is not properly taken under this section, and is not admissible in evidence against objections. (Moller v. United States, 13 U. S. App. 472; 57 Fed. Rep. 490.)

Certificate to deposition.—The act of Congress requires the deposition to be certified by the magistrate (Harris v. Wall, 7 How. 693); and the certificate should state the precise caption (Pentleton v. Forbes, 1 Cranch C. C. 507; Fed. Cas. No. 10966); and the place where the deposition is taken should be named (Tooker v. Thompson, 3 McLean, 92; Fed. Cas. No. 14097); and the court in which the case is pending (Van Ness v. Heineke, 2 Cranch C. C. 259; Fed. Cas. No. 16866); and the names of the parties to the suit (Peyton v. Veitch, 2 Cranch C. C. 123; Fed. Cas. No. 11057; Centre v. Keene, 2 Cranch C. C. 198; Fed. Cas. No. 2553; Smith v. Coleman, 2 Cranch C. C. 237; Fed. Cas. No. 13029; Waskern v. Diamond, Hemp. 701; Fed. Cas. No. 17248; Allen v. Blunt, 2 Wood & M. 131; Fed. Cas. No. 217; Buckingham v. Burgess, 3 McLean, 368; Fed. Cas. No. 2089); and if the name stated in the caption is correct, an error in stating it in the body of the deposition will not vitiate it (Voce v. Lawrence, 4 McLean, 203; Fed. Cas. No. 16979);

and it may be read, although entitled in the case against one defendant alone. (Pannill v. Eliason, 3 Cranch C. C. 358; Fed. Cas. No. 10707.) If the deposition is written by the magistrate, it is sufficient, though not certified to have been written in presence of the witness (Van Ness v. Heineke, 2 Cranch C. C. 259; Fed. Cas. No. 16866; Vasse v. Smith, 2 Cranch C. C. 31; Fed. Cas. No. 16896; Centre v. Keene, 2 Cranch C. C. 198; Fed. Cas. No. 2553); and if he certifies that it was reduced to writing by the witness and himself, it is sufficient. (Bussard v. Catalino, 2 Cranch C. C. 421; Fed. Cas. No. 2228.) If the signature of the witness is on the deposition, the certificate is evidence that he signed it. (Voce v. Lawrence, 4 McLean, 203; Fed. Cas. No. 16979.) The fact that the witness reduced his testimony to writing in the presence of the magistrate may be proved by parol testimony. (Vasse v. Smith, 2 Cranch C. C. 31; Fed. Cas. No. 16896.) The certificate is good evidence of the facts stated therein (Bell v. Morrison, 1 Peters, 351; Banks v. Miller, 1 Cranch C. C. 543; Fed. Cas. No. 963); but if it does not show that the requisites of the statute have been complied with, it cannot be read. (Thorpe v. Simmons, 2 Cranch C. C. 195; Fed. Cas. No. 14007; Luther v. The Merritt Hunt, Newb. Adm. 4; Fed. Cas. No. 8610.) It need not state that the magistrate is not of counsel for either party and not interested in the event of the cause. (Miller v. Young, 2 Cranch C. C. 53; Fed. Cas. No. 9596; Peyton v. Veitch, 2 Cranch C. C. 123; Fed. Cas. No. 11057.) The certificate of the notary that he is "not of counsel nor interested in any manner whatever in this cause" is sufficient. (American Exch. Nat. Bank v. First Nat. Bank, 82 Fed. Rep. 961.) It is not necessary that it should appear in the deposition or certificate that the witness is not a resident of the district. (Sage v. Tauszky, 6 Cent.

L. J. 7; Fed. Cas. No. 12214.) If it omits to state whether notice was given, evidence may be given to prove that neither the adverse party nor his attorney were within the distance of one hundred miles (Travers v. Bell, 2 Cranch C. C. 160; Fed. Cas. No. 14149); but the certificate that witness lives at a greater distance is prima facie evidence of that fact. (Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Merrill v. Dawson, Hemp. 563; Fed. Cas. No. 9469; Tooker v. Thompson, 3 McLean, 92; Fed. Cas. No. 14097.) The word "lives" must be inserted, as it cannot be supplied, so as to show that witness lives more than one hundred miles from the place of trial. (Dunke v. Worcester, 5 Biss. 102; Fed. Cas. No. 4162.) The officer taking the deposition must certify each item of costs before him. (Russell v. Ashley, Hemp. 546; Fed. Cas. No. 12150.) No formal certificate is necessary to be attached to exhibits in order to make them parts of the deposition in which reference is made to them. If the indorsements of the examining commissioner on the exhibits and depositions be made by the same person and the exhibits are so marked and described by the commissioner that identity is unmistakably established, this is sufficient. (Bird v. Halsey, 87 Fed. Rep. 671.)

§ 384. **Transmission to the court of depositions de bene esse.**—Every deposition taken under the two preceding sections shall be retained by the magistrate taking it until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it ap-

pears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. (Rev. Stats. sec. 865.)

Construction.—This section is not to be construed as changing the construction of the statute which it re-enacts, in respect to the time when depositions de bene esse may be opened. (United States v. Tilden, 10 Ben. 170; Fed. Cas. No. 16520.)

Delivery, how made.—The deposition may be directed to the judge of the court (Thorp v. Orr, 2 Cranch C. C. 335; Fed. Cas. No. 14006); or to the clerk. (Whitney v. Huntt, 5 Cranch C. C. 120; Fed. Cas. No. 17589.) If sent by mail the officer should certify that it was retained until it was seated and sent to the clerk. (Shankwiker v. Reading, 4 McLean, 240; Fed. Cas. No. 12704.) And if the envelope is sealed and the name of the officer written across the seal, it is sufficient (Thorp v. Orr, 2 Cranch C. C. 335; Fed. Cas. No. 14006); but if taken by the clerk of the court, it need not be sealed up. (Nelson v. Woodruff, 1 Black, 156.) If the magistrate does not retain it until he delivers it into court, or seals and directs it, the deposition cannot be read. (Jones v. Neale, 1 Hughes, 268; Fed. Cas. No. 7483.) No notice of filing need be given to a party who knows that a deposition has been given. (Nelson v. Woodruff, 1 Black, 156.) Exhibits properly identified as a part of a deposition cannot be deprived of their character as part of the depositions because they are for convenience or for any other reason mailed to the clerk

in a separate package. (Bird v. Halsey, 87 Fed. Rep. 671.)

Deposition, when read.—A deposition de bene esse can be read only when the witness himself is unobtainable (The Samuel, 1 Wheat. 9; Wood v. Kellogg, 6 McLean, 44; Fed. Cas. No. 17345), unless it appears that he cannot attend personally (Park v. Willis, 1 Cranch C. C. 357; Fed. Cas. No. 10716); and proof of that fact may be given without issuing a subpoena. (Park v. Willis, 1 Cranch C. C. 357; Fed. Cas. No. 10716; Leatherberry v. Radcliff, 5 Cranch C. C. 550; Fed. Cas. No. 8163; but see Brown v. Galloway, Pet. C. C. 291; Fed. Cas. No. 2006.) And the party offering it must prove diligence in endeavoring to procure the witness. (Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Park v. Willis, 1 Cranch C. C. 357; Fed. Cas. No. 10716; Jones v. Greenolds, 1 Cranch C. C. 339; Fed. Cas. No. 7464; Penn v. Ingraham, 2 Wash. C. C. 487; Fed. Cas. No. 10944; Banert v. Day, 3 Wash. C. C. 243; Fed. Cas. No. 836; Pettibone v. Derringer, 4 Wash. C. C. 215; Fed. Cas. No. 11043; Read v. Bertrand, 4 Wash. C. C. 558; Fed. Cas. No. 11603.) Where a party knows that the witness has since removed within reach of a subpoena, he is bound to procure his personal attendance. (Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Russell v. Ashley, Hemp. 546; Fed. Cas. No. 12150.) A deposition may be used although taken from the file with leave of court, and the certificate amended (Leatherberry v. Radcliffe, 5 Cranch C. C. 550; Fed. Cas. No. 8163); but if opened out of court, without consent of the adverse party, it cannot be used (Beale v. Thompson, 8 Cranch, 70; The Roscius, 1 Brown, 442; Fed. Cas. No. 12042); and consent out of court should be evidenced by a writing duly signed. (The Roscius, 1 Brown, 442; Fed. Cas. No. 12042.) If

the attorney appears and cross-examines the witness, it is a waiver of irregularity in the notice (Dinsmore v. Maroney, 4 Blatchf. 416; Fed. Cas. No. 3920), and of all formal objections. (Shutte v. Thompson, 15 Wall. 151; United States v. One Case, 1 Paine, 400; Fed. Cas. No. 15924.) Where both parties have examined the witness, one party has no right to direct a commissioner to withhold it simply because the testimony has taken him by surprise. (Grand Haven First Nat. Bank v. Forest, 44 Fed. Rep. 246.) In a suit in admiralty, where the interpreter whose services were necessary refused to act further, and another could not be obtained before witness, whose deposition was being taken de bene esse, left the port, the part of deposition taken and signed by the witness is not admissible on the trial. (Schiaffino v. The Jacob Brandow, 33 Fed. Rep. 160.) Where a deposition has been read in evidence without opposition, it cannot afterward be objected to as being irregularly taken. (Evans v. Hettich, 7 Wheat. 453; Brown v. Tarkington, 3 Wall. 377; The Georgia, 7 Wall. 32.) A deposition of a party as to transactions with another party, taken while the latter is alive, may, though the latter dies without giving his deposition as he could have done, be used when the suit is revived in the name of his executors. (McMullen v. Ritchie, 64 Fed. Rep. 253.)

Certificate of reasons for taking.—A sufficient cause for taking the deposition cannot be proved by parol evidence. (Wheaton v. Love, 1 Cranch C. C. 451; Fed. Cas. No. 17485.) So if the officer does not assign a sufficient reason for taking it, it will be suppressed. (Harris v. Wall, 7 How. 693; Wheaton v. Love, 1 Cranch C. C. 451; Fed. Cas. No. 17485; Jones v. Knowles, 1 Cranch C. C. 523; Fed. Cas. No. 7474; Shutte v. Thompson, 15 Wall. 151; Sage v. Tauszky, 6 Cent. L. J. 7; Fed. Cas. No. 12214; Jones v. Neale, 2

Mart. (N. C.) 81; Woodward v. Hall, 2 Cranch C. C. 235; Fed. Cas. No. 18005.) The certificate and seal of a notary public are sufficient proof of his authority. (Dinsmore v. Maroney, 4 Blatchf. 416; Fed. Cas. No. 3920.) And so of a mayor, although not certified under his seal. (Price v. Morris, 5 McLean, 4; Fed. Cas. No. 11414.) A certificate without the official seal is not sufficient where he has an official seal, and usually certifies his official acts. (Paul v. Lowry, 2 Cranch C. C. 628; Fed. Cas. No. 10844.) The appointment of a commissioner of a circuit court need not be authenticated by the record (Whitney v. Huntt, 5 Cranch C. C. 120; Fed. Cas. No. 17589); it should be shown by a certificate of the clerk and of the presiding judge. (Tooker v. Thompson, 3 McLean, 92; Fed. Cas. No. 14097.) And the fact that he who certifies to a deposition is an officer may be proved by parol. (Dunlop v. Monroe, 1 Cranch C. C. 536; Fed. Cas. No. 4167; Paul v. Lowry, 2 Cranch C. C. 628; Fed. Cas. No. 10844.) The presumption is, that the officer taking the deposition is the proper officer. (Vasse v. Smith, 2 Cranch C. C. 31; Fed. Cas. No. 16896; Price v. Morris, 5 McLean, 4; Fed. Cas. No. 11414; Ruggles v. Bucknor, 1 Paine, 358; Fed. Cas. No. 12115.)

Objections to deposition.—Appearance of the party or his attorney, and the examination or cross-examination of the witness without protest or in silence, is a waiver of objection to formal defects (Shutte v. Thompson, 15 Wall. 151; Dinsmore v. Maroney, 4 Blatchf. 416; Fed. Cas. No. 3920); if read in evidence, it is too late to object. (Evans v. Hettich, 7 Wheat. 453; Brown v. Parkington, 3 Wall. 377.) An objection on account of formal defects must be made by motion to suppress, before going to trial. (Claxton v. Adams, 1 McAr. 496.) If depositions are

made without notice, the court may allow a continuance to enable the adverse party to cross-examine the witness, or may reject his testimony. (Dade v. Young, 1 Cranch C. C. 123; Fed. Cas. No. 3534; Straas v. Marine Ins. Co., 1 Cranch C. C. 343; Fed. Cas. No. 13518; Barrell v. Simonton, 3 Cranch C. C. 681; Fed. Cas. No. 1042; Allen v. Blunt, 2 Wood & M. 121; Fed. Cas. No. 217.) If suppressed, the case may be continued to allow of the taking of another. (Moore v. Nelson, 3 McLean, 383; Fed. Cas. No. 9771; Luther v. The Merritt Hunt, Newb. Adm. 4; Fed. Cas. No. 8610.) A waiver of all objections operates as a waiver at a subsequent trial (Edmondson v. Barrell, 2 Cranch C. C. 228; Fed. Cas. No. 4284); and although waived as to the manner and form of taking it, yet it must be returned by the magistrate, in conformity with this section. (Livingston v. Pratt, Brown Adm. 66; Fed. Cas. No. 8417.) If on file for three years, it cannot be excluded on the ground of defect on the certificate after the cause is set down for hearing. (Bank v. Travers, 4 Biss. 507; Fed. Cas. No. 886.) A party knowing of the incompetency of a witness waives the objection by appearing and cross-examining him, but not if he does not at the time know that fact (U. S. v. One Case, 1 Paine, 400; Fed. Cas. No. 15924); but the mere presence of the attorney is not a waiver. (Harris v. Wall, 7 How. 693.) General objections to a deposition may be overruled, if any part of the deposition appears to be admissible in any view of the case (First National Bank v. Rush, 56 U. S. App. 556; 85 Fed. Rep. 539.) Where the objecting party has consented to the issuing of the commission, and practically united in executing it, and where no notice of objections are given until after trial, informalities in the notice to take and certification are waived. (Bird v. Halsy, 87 Fed. Rep. 671.) An agree-

ment that neither party will take objection to the form of a deposition must show that the agreement was made with special reference to a given paper purporting to be a deposition. (Lutcher v. United States, 72 Fed. Rep. 968.) Where a party moves before the commencement of a trial for the suppression of the deposition, and then suffers it to be read without objection, he cannot avail himself of the previous exception in the reviewing court. (Union Pac. Ry. Co. v. Reese, 15 U. S. App. 92; 56 Fed. Rep. 288; Northern Pac. Ry. Co. v. Urlin, 158 U. S. 271.) The whole of a deposition may be suppressed on the ground that a witness has refused to answer a material question. (Bird v. Halsey, 87 Fed. Rep. 671.) A motion to suppress a deposition should be made before a case is called. (Bibb v. Allen, 149 U. S. 481.)

§ 385. **Dedimus potestatem and in perpetuam, etc.**—In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to make depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five shall not apply to any deposition to be taken under the authority of this section. (Rev. Stats. sec. 866.)

Construction.—This act, being in derogation of the common law, should be strictly construed. (United States v. Parrott, 1 McAll. 447; Fed. Cas. No. 15999.)

The preceding sections relating to depositions de bene esse do not apply to a dedimus potestatem. (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523; Fed. Cas. No. 7486.)

How taken.—Depositions may be taken under this section "according to common-law usages," which, as to suits in equity, refers to the practice in equity courts. (Bischoffscheim v. Baltzer, 10 Fed. Rep. 1; 20 Blatchf. 229.) It is not taken "according to common-law usage," if one of the parties writes down the answers for the commissioner in the absence of the other party to the suit. (United States v. Pings, 4 Fed. Rep. 714.) The common usage refers to practice under state laws (Buddicum v. Kirk, 3 Cranch, 293); and when necessary it may be taken, although the State law does not allow it. (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523; Fed. Cas. No. 7486.) A commission may be granted at law, and there is no need to go into equity therefor (Peters v. Prevost, 1 Paine, 64; Fed. Cas. No. 11032), and the practice in the State courts should be observed. (Sutton v. Mandeville, 1 Cranch C. C. 115; Fed. Cas. No. 13650.) A commission will not be issued in a suit at law if the witness lives within one hundred miles. (Wellford v. Miller, 1 Cranch C. C. 485; Fed. Cas. No. 1738; Gustine v. Ringgold, 4 Cranch C. C. 5877; Fed. Cas. No. 7877; Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 11740.) An examiner may be appointed in an equity case outside as well as inside the jurisdiction (N. C. Railroad Co. v. Drew, 3 Woods, 692; Fed. Cas. No. 17434); and although the witness lives within the distance of one hundred miles. (Wellford v. Miller, 1 Cranch C. C. 398; Fed. Cas. No. 17090; Russell v. McLellan, 3 Wood. & M. 157; Fed. Cas. No. 12158.) The only mode in which a deposition can be taken in a foreign country is under a commis-

sion (Stein v. Bowman, 13 Peters, 209), although the witness has been previously examined under a commission here. (Winthrop v. Union Ins. Co., 2 Wash. C. C. 7; Fed. Cas. No. 17901.) Depositions under a dedimus potestatem are not to be considered as taken de bene esse. (Sargeant v. Biddle, 4 Wheat. 508.)

Application for commission.—An application must be made in open court, and not at chambers (Peters v. Prevost, 1 Paine, 64; Fed. Cas. No. 11032); and it must show that the evidence is material. (United States v. Parrott, McAll. 447; Fed. Cas. No. 15999.) It is not granted, of course, but only on sufficient cause shown (United States v. Parrott, McAll. 447; Fed. Cas. No. 15999); and must be founded on affidavit showing it to be necessary to the justice of the case (Sutton v. Mandeville, 1 Cranch C. C. 115; Fed. Cas. No. 13650); but it need not designate the place at which the deposition is to be taken (Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 11740); but if it designates the place the commission should conform to it. (Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 11740.) It may be made to take testimony in a foreign country, although at war with this country. (Peters v. Prevost, 1 Paine, 64; Fed. Cas. No. 11032.) The notice of a motion for a commission may be served on the attorney of the adverse party. (Potts v. Skinner, 1 Cranch C. C. 57; Fed. Cas. No. 11348; Bowie v. Talbot, 1 Cranch C. C. 247; Fed. Cas. No. 1732; Irving v. Sutton, 1 Cranch C. C. 575; Fed. Cas. No. 7078; Wheaton v. Love, 1 Cranch C. C. 429; Fed. Cas. No. 17484; Buddicum v. Kirk, 3 Cranch, 293.)

Interrogatories—Practice.—A copy of the interrogatories and written notice of the rule and the names of the commissioners should be served on the

adverse party or his attorney. (Fowler v. Merrill, 11 How. 375; Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 11740.) The interrogatories and cross-interrogatories should be filed in court before issuing the commission. (Cunningham v. Otis, 1 Gall. 166; Fed. Cas. No. 3485.) The practice is to propose particular interrogatories about matters specially inquired into, and to subjoin a general interrogatory as to any other matter material to the party proposing it. (Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 11740.) Where the interrogatories are filed according to the rules of court, and the adverse party fails to file cross-interrogatories, the commission may be issued without them (The Norway, 1 Ben. 493; Fed. Cas. No. 10357), and without notice. (Trevall v. Bache, 5 Cranch C. C. 463; Fed. Cas. No. 5113.) Exceptions intended to be taken to any particular interrogatories should be propounded as objections before the commission issues, or they will be deemed waived (Cocker v. F. H. & B. Co., 1 Story, 169; Fed. Cas. No. 2930); and if the form of the interrogatories cannot be agreed on, they should be referred to a master to settle the form, subject to ultimate review on appeal. (Cocker v. F. H. & B. Co., 1 Story, 169; Fed. Cas. No. 2930.) An irrelevant interrogatory will be stricken out before the commission issues. (Cocker v. F. H. & B. Co., 1 Story, 169; Fed. Cas. No. 2930.) Interrogatories should be confined to the matters set up in the bill, and be relevant to the case. (Gormully & Jeffery Mfg. Co. v. Bretz, 64 Fed. Rep. 612.) The rule of practice does not permit the plaintiff in an action at law to file with his complaint interrogatories to be answered by defendant. (Tabor v. Indianapolis Journal Newspaper Co., 66 Fed. Rep. 423.)

Notice of time and place.—Depositions in perpetuam rei memoriam cannot be taken ex parte by a

proceeding in equity without any service of process upon the defendants in interest though they are out of the country. (Green v. Campagnia Generale, 82 Fed. Rep. 491.) Notice of the time and place of taking the deposition may be served on the party or his attorney. (Fowler v. Merrill, 11 How. 375.) It may be given by leaving a true copy thereof with a member of the family. (Fowler v. Merrill, 11 How. 375.) If the application does not designate the place, the commissioner should give notice to the adverse party (Knode v. Williamson, 17 Wall. 586; Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 17740); but no notice need be given to a party who, after being duly notified, fails to file cross-interrogatories. (Fowler v. Merrill, 11 How. 375.) If the notice is sent by mail, it is not sufficient, if not received until after the deposition is taken. (Walker v. Parker, 5 Cranch C. C. 639; Fed. Cas. No. 17082.) If notice is received or waived, the attorney cannot afterward object on account of no notice. (Buddicum v. Kirk, 3 Cranch, 293.) An hour's notice in the place where the attorney resides is sufficient. (Nicholls v. White, 1 Cranch C. C. 58; Fed. Cas. No. 10235.) An affidavit of service of notice need not state that the person with whom a copy was left was informed of the purport of the notice. (McCall v. Towers, 1 Cranch C. C. 41; Fed. Cas. No. 8674.)

Authority of commissioner.—The authority of the commissioner is special, and must be strictly pursued. (Gupp v. Brown, 4 Dall. 410; Armstrong v. Brown, 1 Wash. C. C. 43; Fed. Cas. No. 542; Boudereau v. Montgomery, 4 Wash. C. C. 186; Fed. Cas. No. 1694.) If issued to several commissioners, yet if it confers powers upon any one of them, a deposition taken by one alone may be read (The Griffin, 4 Blatchf. 203; Fed. Cas. No. 5814; Lonsdale v. Brown, 3 Wash. C. C. 404; Fed. Cas. No. 8492); but

if taken by the commissioner in conjunction with a person not named in the commission, it cannot be read. (Willings v. Consequa, Peters C. C. 301; Fed. Cas. No. 17767; Banert v. Day, 3 Wash. C. C. 243; Fed. Cas. No. 836.) Where a commission is issued to several commissioners, and executed by a part only, the deposition cannot be read. (Gupp v. Brown, 4 Dall. 410; Armstrong v. Brown, 1 Wash. C. C. 43; Fed. Cas. No. 542; Munns v. Dupont, 3 Wash. C. C. 31; Fed. Cas. No. 9926.) The commissioner is not the agent of the party nominating him. (Gilpins v. Consequa, Peters C. C. 85; Fed. Cas. No. 5452.) A deposition taken in a foreign country may be read, although it was taken by a judge in the presence of the commissioner. (Winthrop v. Union Ins. Co., 2 Wash. C. C. 7; Fed. Cas. No. 17901.)

Issuance of commission.—A commission will not be issued until the commissioners are named. (Vanstophorst v. Maryland, 2 Dall. 401.) If issued by consent and without interrogatories, the deposition cannot be read if notice was not given of the time and place for taking it. (Dunlop v. Monroe, 1 Cranch C. C. 536; Fed. Cas. No. 4167.) If taken by one party it may be read by the adverse party, although the notice was irregular. (Yeaton v. Fry, 5 Cranch, 335.) Whether the party will be required to name the witnesses to be examined depends on the discretion of the court. If taken out to prove pedigree, their names will not be required. (Parker v. Nixon, Bald. 291; Fed. Cas. No. 10744.) Exhibits annexed to a deposition may be taken from the file and be attached to the commission upon filing copies thereof. (Daly v. Maguire, 6 Blatchf. 137; Fed. Cas. No. 3551.) The commission may be issued to a woman, although the wife of the witness. (The Norway, 2 Ben. 121; Fed. Cas. No. 10358.) If a

party fails to file interrogatories the commission is issued ex parte, and interrogatories cannot thereafter be put to the witness (Fowler v. Merrill, 11 How. 375).

Proceedings under commission.—The regulation of the proceedings under a commission is a matter in the discretion of the court. (Cunningham v. Otis, 1 Gall. 166; Fed. Cas. No. 3485.) And the law regulating the proceedings of the court determines the mode in which the witness should be sworn or qualified. (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523; Fed. Cas. No. 7486.) The mode of executing such commission is governed by this section, and not by State statutes. (United States v. Pings, 4 Fed. Rep. 714.) The commissioner is an officer of the court, with power to take the examination, and he is to exercise this power according to the directions of the commission, which is his chart and guide. (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523; Fed. Cas. No. 7486; Gilpins v. Consequa, 3 Wash. C. C. 184; Fed. Cas. No. 5452.) The deposition must be taken at the time and place designated (Boudereau v. Montgomery, 4 Wash. C. C. 186; Fed. Cas. No. 1694; Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 11740), and the notice naming the day must also name the year (Knode v. Williamson, 17 Wall. 586); and on an adjournment from day to day it cannot pass over an intermediate day. (Buddicum v. Kirk, 3 Cranch, 293.) The parties cannot appear before the commissioner either in person or by attorney (Knode v. Williamson, 17 Wall. 586; Cunningham v. Otis, 1 Gall. 166; Fed. Cas. No. 3485); nor can a witness have a friend to attend and assist him before the commissioner (Cunningham v. Otis, 1 Gall. 166; Fed. Cas. No. 3485.) Witnesses may be examined, although not named in the commission, where their names and testimony were not discovered until the commission was is-

sued. (The Infanta, Abb. Adm. 263; Fed. Cas. No. 7030.) The interrogatories may be shown to the witness before he is called upon to give his testimony (North Carolina R. R. Co. v. Drew, 3 Woods, 692; Fed. Cas. No. 17434); but no additional interrogatories can be filed. (Cunningham v. Otis, 1 Gall. 166; Fed. Cas. No. 3485.)

Examination of witness.—The witness should be examined as to each interrogatory, and if he omits to answer any, the deposition is not admissible. (Nelson v. United States, Peters, C. C. 235; Fed. Cas. No. 10116; Kentland v. Bisset, 1 Wash. C. C. 144; Fed. Cas. No. 7742; Wenthrop v. Union Ins. Co., 2 Wash. C. C. 7; Fed. Cas. No. 17901.) So if no answer is given to the general interrogatory (Richardson v. Golden, 3 Wash. C. C. 109; Fed. Cas. No. 11782; Dodge v. Israel, 4 Wash. C. C. 323; Fed. Cas. No. 3952); and it is no ground of objection that the material evidence is brought out under that instead of under the preceding special interrogatories. (Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 11740.) Although the answer to an interrogatory would not be legal evidence, the deposition may be read if the interrogatory was not put to the witness. (Bell v. Davidson, 3 Wash. C. C. 328; Fed. Cas. No. 1248.) If the cross-interrogatories are not put to the witness, the deposition cannot be read (Gilpins v. Consequa, Peters C. C. 88; Fed. Cas. No. 5452); but it is no objection that they were not put to each witness till after the direct interrogatories were answered by the last witness. (Gilpins v. Consequa, Peters C. C. 88; Fed. Cas. No. 5452.) On a commission issued ex parte the party may put as many or as few interrogatories as he thinks proper, but the last must be put. (Fowler v. Merrill, 11 How. 375.)

To be reduced to writing.—The deposition may be reduced to writing by the magistrate or by the deponent, in the presence of the magistrate (Stockwell v. United States, 3 Cliff. 284; Fed. Cas. No. 13466); it is immaterial in whose handwriting it is (Keene v. Meade, 3 Peters, 1); but it will be suppressed if the answers of the witness are written down by counsel for the party who procured the commission. (United States v. Pings, 4 Fed. Rep. 714; but see Nicholls v. White, 1 Cranch C. C. 58; Fed. Cas. No. 10235; Atkinson v. Glenn, 4 Cranch C. C. 134; Fed. Cas. No. 610.) It is not necessary that the deposition be signed by the witness (Ketland v. Bissett, 1 Wash. C. C. 144; Fed. Cas. No. 7742); and if prepared and signed by the witness before the oath is administered, it is improper. (Dodge v. Israel, 4 Wash. C. C. 323; Fed. Cas. No. 3952; N. C. Railroad Co. v. Drew, 3 Woods, 692; Fed. Cas. No. 17434.) If the commission is issued to an alien, it may be written in the English language, though it does not appear that there was a sworn interpreter. (Gilpins v. Consequa, Peters C. C. 88; Fed. Cas. No. 5452.)

Return.—The return must show that the commissioner took the oath annexed to the commission (Frevall v. Bache, 5 Cranch C. C. 463; Fed. Cas. No. 5113; but see Gilpins v. Consequa, 3 Wash. C. C. 184; Fed. Cas. No. 5452); and the return that he took the oath is sufficient evidence that it was properly administered. (Winter v. Simonton, 3 Cranch C. C. 104; Fed. Cas. No. 17894.) Where the deposition was taken by a commissioner of the circuit court it need not appear that he was sworn. (Hoyt v. Hammekin, 14 How. 346.) It should appear by the certificate or by other evidence that the examination was conducted at the time and place designated (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523; Fed.

Cas. No. 7486; Rhoades v. Selin, 4 Wash. C. C. 715; Fed. Cas. No. 11740); and his certificate is prima facie evidence thereof. (Boudereau v. Montgomery, 4 Wash. C. C. 186; Fed. Cas. No. 1694.) The return need not show that the witness was cautioned before being sworn, nor need it set out the form of the oath; that he was duly sworn is sufficient. (Keene v. Meade, 3 Peters, 1; Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523; Fed. Cas. No. 7486.) The commissioners need not certify in whose handwriting the deposition was taken down. (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523; Fed. Cas. No. 7486.) If exhibits are referred to by the witness, they should be annexed to the deposition with marks or references to show that they are the identical ones referred to. (Dodge v. Israel, 4 Wash. C. C. 323; Fed. Cas. No. 3952.) If the commissioner states in the caption of the deposition that it was taken in pursuance of the commission, an omission therein of the names of one of the parties named in the commission will not render it inadmissible (Fowler v. Merrill, 11 How. 375); so that the insertion of a wrong middle letter in the name of one of the parties may be corrected, on motion, upon the return of the commission. (Keene v. Meade, 3 Peters, 1.) The envelope may be directed to the chief judge of the court (Frevall v. Bache, 5 Cranch C. C. 463; Fed. Cas. No. 5113); and if opened before it comes into the hands of the clerk, it may be set aside and a new commission be issued. (United States v. Price, 2 Wash. C. C. 356; Fed. Cas. No. 16089.) The return is prima facie evidence of the facts stated therein as to the execution of the commission. (Winter v. Simonton, 3 Cranch C. C. 104; Fed. Cas. No. 17894; Boudereau v. Montgomery, 4 Wash. C. C. 186; Fed. Cas. No. 1694.)

Objections.—A party who unites in issuing a commission cannot afterward object to it on the ground that the witness lives within the distance of one hundred miles (Sergeant v. Biddle, 4 Wheat. 508; Ridgeway v. Ghequier, 1 Cranch C. C. 4; Fed. Cas. No. 11813); but it cannot be read in an action at law if the witness at the time of the trial, is in the place where the court is held, and is able to attend (Weed v. Kellogg, 6 McLean, 44; Fed. Cas. 17345); nor can a party who joins in a commission object that it was issued improperly or improvidently (Sergeant v. Biddle, 4 Wheat. 508); so irregularities are waived by appearing and cross-questioning the witness. (Mechanics' Bank v. Seton, 1 Peters, 299.) Objection to irregularities not taken and noted when the deposition is taken and by motion to suppress before the trial has begun, will be deemed waived (Doane v. Glenn, 21 Wall. 33; York Co. v. Central Railroad, 3 Wall. 107; Blackburn v. Crawford, 3 Wall. 175); an objection to the omission to produce a memorandum referred to can be taken only by motion to suppress (Blackburn v. Crawford, 3 Wall. 175); so where the witness fails to produce a copy of a prior deposition. (Winans v. N. Y. & Erie R. R. Co., 21 How. 88.) A waiver of notice of the taking of a deposition may be inferred from the conduct of the party or his attorney (Buddicum v. Kirt, 3 Cranch, 293); but a party may take exceptions to it that were not taken at the time it was returned and opened (Walker v. Parker, 5 Cranch C. C. 639; Fed. Cas. No. 17082); so on objection to the answer to a leading interrogatory, the deposition will be referred to a master to inquire if the interrogatory is leading. (Boudereau v. Montgomery, 4 Wash. C. C. 186; Fed. Cas. No. 1694.) The party at whose instance a deposition was taken may read the answer to a cross-interrogatory, although the answer to a di-

rect interrogatory was suppressed. (Alsop v. Commercial Ins. Co., 1 Sum. 451; Fed. Cas. No. 262.) The failure of a party to note objections to depositions when taken or to present them by motion to suppress is a waiver of the objections. (Howard v. Stillwell etc. Co., 139 U. S. 199.) Where questions put to a witness were unobjectionable, and the answers were responsive, and not hearsay, objections taken are frivolous. (Gregory Consol. M. Co. v. Starr, 141 U. S. 222.)

§ 386. **Depositions in perpetuam, when admissible.**—Any court of the United States may, in its discretion, admit in evidence in any cause before it, any deposition taken *in perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof. (Rev. Stats. sec. 867.)

Note.—If the deposition in perpetuam rei memoriam is not admissible in the State court, it is not admissible in the Federal court. (Gould v. Gould, 3 Story, 516; Fed. Cas. No. 5637; see Seeley v. Kansas City Star Co., 71 Fed. Rep. 554.) Where the remedy exists under section 866, an application under this section will be denied. (Richter v. Jerome, 115 U. S. 55.)

§ 387. **Depositions under a dedimus potestatem, how taken.**—When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpoena for such

witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court. (Rev. Stats. sec. 868.)

Note.—This section was intended to authorize the procuring of means of a commission, when necessary, any evidence that might be procured upon a trial. (In re Shepard, 18 Blatchf. 227; S. C., 3 Fed. Rep. 12.) The commission must be accompanied by written interrogatories, and furnish information as to the inquiry, or the court cannot determine the question as to his refusal to answer a proper question. (In re Glaser, 2 Bank. Reg. 398; Fed. Cas. No. 5476; see Sergeant v. Biddle, 4 Wheat. 508; York Co. v. Cent. R. R., 3 Wall. 113.)

§ 388. **Subpoena duces tecum under a dedimus potestatem.**—When either party in such suit applies to any judge of a United States court in such district or Territory for a subpoena commanding a witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any

paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties. (Rev. Stats. sec. 869.)

A subpoena duces tecum may issue to witness to be examined on a commission. (In re Shepard, 18 Blatchf. 226; S. C., 3 Fed. Rep. 12.) The writ is expressly confined to the production of "any paper or

writing or written instrument or book or other document." (In re Shepard, 18 Blatchf. 226; 3 Fed. Rep. 12.) The subpoena duces tecum must describe or refer to the paper or document which is in the possession of the witness and which is required (Murray v. State of Louisiana, 163 U. S. 101.) It cannot issue to a witness not a party to a suit to compel him to bring before the court patterns for a stove. (In re Shepard, 18 Blatchf. 226; 3 Fed. Rep. 12.) A defendant cannot be compelled to make discoveries in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. (Atwill v. Ferrett, 2 Blatchf. 39; Fed. Cas. No. 640.) The defendant cannot be compelled, under a subpoena duces tecum, to produce his books and papers and plates to be used in evidence for plaintiff. (Johnson v. Donaldson, 18 Blatchf. 287; S. C., 3 Fed. Rep. 22.) A motion to compel such testimony will not be granted in aid of an action for trespass for the violation of a copyright. (Atwill v. Ferrett, 2 Blatchf. 39; Fed. Cas. No. 640.) The relief will only be to the extent of the part infringed. (Story v. Holcombe, 4 McLean, 306; Fed. Cas. No. 13497.) The various provisions of the law should be liberally construed to give effect to what may be considered the inherent right of the author to his work (Myers v. Callahan, 5 Fed. Rep. 726; 11 Biss. 139); but equity will not, at the instance of the author, where he has made an assignment forever, restrain the assignee from selling after a renewal taken out by the author. (Paige v. Banks, 7 Blatchf. 152; Fed. Cas. No. 10671.) The right to a chart is violated only when another copies from the chart of him who has secured the copyright. ((Blunt v. Patten, 2 Paine, 398; Fed. Cas. No. 1580; compare Gray v. Russell, 1 Story, 11; Fed. Cas. No. 5728; Emerson v. Davies, 3 Story, 768; Fed. Cas. No. 4436.) The publication of a map made from

materials collected while in the service of the government as draughtsman belongs to the government. (Commonwealth v. Desilvan, 3 Phila. 31; see Heine v. Appleton, 4 Blatchf. 125; Fed. Cas. No. 6324.) Compiling maps of a city of a particular design from public records into an atlas, and without taking out a copyright; making several copies and selling them, and placing one copy in the hands of the city for public use, is a dedication to public use (Rees v. Peltzer, 75 Ill. 475); but depositing one chart in the navy department does not make it public property. (Blunt v. Patten, 2 Paine, 397; Fed. Cas. No. 1580.) A single sheet containing diagrams is a subject of copyright; the form of the publication is immaterial (Drury v. Ewing, 1 Bond, 540; Fed. Cas. No. 4095); but an advertising card is not. (See Ehret v. Pierce, 10 Fed. Rep. 553; see United States v. Hall, 44 Fed. Rep. 883.)

§ 389. **Witness under a dedimus potestatem.**—No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpœna. (Rev. Stats. sec. 870.)

§ 390. **Depositions in District of Columbia in suits pending elsewhere.**—When a commission to

take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the supreme court of said district, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said district therein specified. (Rev. Stats. sec. 871.)

§ 391. When no commission or notice.—When it satisfactorily appears by affidavit to any justice of the supreme court of the District of Columbia, or to any commissioner for taking depositions appointed by said court

First. That any person within said district is a material witness for either party in a suit pending in any State or territorial or foreign court;

Second. That no commission nor notice to take the testimony of such witness has been issued or given; and

Third. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof—such officer shall issue his

summons, requiring the witness to appear before him at a place within the district, at some reasonable time, to be stated therein, to testify in such suit. (Rev. Stats. sec. 872.)

§ 392. **District of Columbia—Manner of taking and transmitting the deposition.**—Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit. (Rev. Stats. sec. 873.)

§ 393. **District of Columbia—Witness fees.**—Every witness appearing and testifying under the said provision relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance. (Rev. Stats. sec. 874.)

§ 394. **Letters rogatory from United States courts.**—When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is

directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. [See secs. 4071, 4074.] (Rev. Stats. sec. 875.)

Note.—Depositions under the letters rogatory are not subject to the strict rules of taking depositions. (Nelson v. United States, Pet. C. C. 235; Fed. Cas. No. 10116.)

§ 395. **Letters rogatory from foreign courts.**—When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by such court to make the examination of the witnesses mentioned in said letters shall have power to compel the witness to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts. (19 U. S. Stats. 241.)

§ 396. Subpoenas for witnesses to run into another district.—Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same. (Rev. Stats. sec. 876.)

Note.—If a witness lives within one hundred miles of the place of trial, and he fails to attend when subpoenaed, the court may send an attachment to be executed in another district (United States v. Williams, 4 Cranch C. C. 372; Fed. Cas. No. 16712); and whether he lives beyond the distance or not is to be determined by the actual distance by usual routes. (Ex parte Beebes, 2 Wall. Jr. 127; Fed. Cas. No. 1220.) A subpoena cannot be issued for a witness residing more than one hundred miles from the place of trial. (Henry v. Ricketts, 1 Cranch C. C. 580; Fed. Cas. No. 6386.) The privilege of a witness protects him so as to give him a reasonable time after the disposition of the cause to go home. (Atchison v. Morris, 11 Fed. Rep. 582; 11 Biss. 191.) A party going into another State as a witness, or as a party under process of a court, is exempt from process in such State while necessarily attending there in respect to such trial. (Brooks v. Farwell, 4 Fed. Rep. 167; 2 McCrary, 220; citing Parker v. Hotchkiss, 1 Wall. Jr. 269; Fed. Cas. No. 10739; The Juneau Bank v. McSpedan, 5 Biss. 64; Fed. Cas. No. 7582; and see In re Healy, 24 Alb. L. J. 529.) An attorney while attending to business of his clients in the court of another State is privileged from service of subpoena (Central Trust Co. v. Milwaukee St. Ry. Co., 74 Fed. Rep. 442.) So a party, while in

another State attending a regular examination of witnesses, is privileged. (Plimpton v. Winslow, 9 Fed. Rep. 365; 20 Blatchf. 82. See, as to privilege of witnesses and suitors, Larned v. Griffin, 12 Fed. Rep. 590; Atchison v. Morris, 11 Fed. Rep. 582; 11 Biss. 191; Matthews v. Puffer, 10 Fed. Rep. 606; 20 Blatchf. 233.)

§ 397. **Witnesses—Form of a subpoena—Attendance.**—Witnesses who are required to attend any term of a circuit or district court on the part of the United States shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney. (Rev. Stats. sec. 877.)

§ 398. **Witnesses for indigent defendants.**—Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses—the court in term, or any judge thereof in vacation, may order that such witnesses be subpoenaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in

the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States. (Rev. Stats. sec. 878.)

§ 399. **Recognizance of witnesses.**—Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost. (Rev. Stats. sec. 879.)

§ 400. **Vermont—Recognizance of witnesses, how taken.**—In the district of Vermont all recognizances of witness, taken by any magistrate in said district, for their appearance to testify in any case cognizable either in the district or circuit court thereof, shall be to the circuit court next thereafter to be held in the said district. (Rev. Stats. sec. 880.)

§ 401. **Recognizance of witnesses on application of district attorney.**—Any judge of the

United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and for that purpose may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge. (Rev. Stats. sec. 881.)

§ 402. **Copies of department records and papers.**—Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. (Rev. Stats. sec. 882.)

Copies of records.—The words "papers or documents" mean only such as are made by an officer or an agent of the government in the discharge of his official duty (Block v. United States, 7 Ct. of Cl. 406);

and a copy of such is not competent evidence unless it was the duty of the officer to file the original. (Block v. United States, 7 Ct. of Cl. 406.) In a case where the government is the adverse party, certified copies must be procured, as a mere notice to produce the original is not sufficient. (Barney v. Schmeider, 9 Wall. 248; Chadwick v. United States, 3 Fed. Rep. 750.) Copies of documents in the immediate custody of the treasury department may be authenticated by the secretary or assistant secretaries, under the seal of the department. (Chadwick v. United States, 3 Fed. Rep. 753.) The mode of authentication prescribed by statute must be strictly pursued. (Block v. United States, 7 Ct. of Cl. 406.) If the officer having charge of the paper certifies that it is a true copy, and the head of the department certifies to the official character of such officer, it is sufficiently authenticated. (Thompson v. Smith, 2 Bond, 320; Fed. Cas. No. 13976.) A certificate by the acting commissioner of Indian affairs, whose official character is certified by the secretary of the interior, is sufficient. (Stephens v. Westwood, 25 Ala. 716.) A certificate of the secretary of State, under seal of the department of State, is evidence to prove the official character of an accredited minister, and the date of his recognition. (United States v. Benner, Bald. 234; Fed. Cas. No. 14568; United States v. Liddle, 2 Wash. C. C. 205; Fed. Cas. No. 15598.) If a paper is signed by a secretary of the treasury, and authenticated by the seal of that department, it is sufficient (United States v. Hunt, 13 Fed. Rep. 240; White v. St., Guirons, Minor, 331); so of the copy of a collector's bond (Chadwick v. United States, 3 Fed. Rep. 750); so of the copy of a return certified by the assistant secretary of the treasury, under seal of the department. (Chadwick v. United States, 3 Fed. Rep. 750.) A copy of a vessel's register certified by the registrar, and his official

character attested by the secretary of the treasury on seal of the department, is competent evidence. (Carlett v. Pac. Ins. Co., 1 Paine, 594; Fed. Cas. No. 2517; Bleecker v. Bond, 3 Wash. C. C. 529; Fed. Cas. No. 1534.) A certified copy of a paper on file in the office of a quartermaster-general, under seal of the department, is competent evidence. (Thompson v. Smith, 2 Bond. 320; Fed. Cas. No. 13976; Crowell v. Hopkinton, 45 N. H. 9; see Wetmore v. United States, 10 Peters, 647.) A copy of an adjudication of a claim in the treasury department, certified by an auditor alone, without the seal of the department, is not competent evidence. (Wickliffe v. Hill, 3 Litt. 330.) A duly certified transcript from the books and proceedings of the treasury department is prima facie evidence of the facts stated therein. (United States v. Eckford, 1 How. 250; Walton v. United States, 9 Wheat. 651; Soule v. United States, 100 U. S. 8; United States v. Eggleston, 4 Sawy. 199; Fed. Cas. No. 15027.) A certificate of the treasury department, declaring an account contained in the treasury transcript to be an account between the United States and the collector of internal revenue, has the legal effect of making the treasury transcript prima facie evidence of the fact of indebtedness which it certifies (United States v. Hunt, 13 Fed. Rep. 240, note), unless upon the face of the account it necessarily appears to be otherwise. (United States v. Hunt, 13 Fed. Rep. 240, note.) Excluding a certified treasury transcript when offered in evidence is error. (United States v. Hunt, 13 Fed. Rep. 240.) If the execution of the official bond is denied, it cannot be proven by a copy certified by the secretary of the treasury under the section. (United States v. Humason, 8 Fed. Rep. 71; 7 Sawy. 252.)

§ 403. **Copies of records, etc., in office of solicitor of the treasury.**—Copies of any documents,

records, books, or papers in the office of the solicitor of the treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as solicitor for the time, shall be evidence equally with the originals. (Rev. Stats. sec. 883.)

§ 404. **Instruments, etc., of comptroller of the currency.**—Every certificate, assignment, and conveyance executed by the comptroller of the currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer. (Rev. Stats. sec. 884.)

§ 405. **Organization certificates of national banks.**—Copies of the organization certificate of any national banking association, duly certified by the comptroller of the currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate. (Rev. Stats. sec. 885.)

Note.—A copy certified and sealed by the comptroller of the currency is sufficient. (First Nat. Bank v. Kidd, 20 Minn. 234.) A certificate is sufficient in the absence of any evidence that there is any other

bank of the same name at the same place. (Washington Co. Nat. Bank v. Lee, 112 Mass. 521.)

§ 406. Transcripts from books, etc., of the treasury.—When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or, when the suit involves the accounts of the war or navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the register, or by such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court; *provided*, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be neces-

sary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit. (Rev. Stats. sec. 886.)

Note.—This section extends to every delinquency (Bechtel v. United States, 101 U. S. 597), and applies to a surety as well as the delinquent principal. (United States v. Gaussen, 19 Wall. 198.)

Certified transcript as evidence.—Where copies are made evidence by statute, the mode of authentication must be strictly pursued. (Smith v. United States, 5 Pet. 292.) A duly certified copy of a bond is competent evidence. (United States v. Vanzandt, 2 Cranch C. C. 338; Fed. Cas. No. 16611; United States v. Griffith, 2 Cranch C. C. 336; Fed. Cas. No. 15263; United States v. Lent, 1 Paine, 117; Fed. Cas. No. 15593.) It is the certificate of the auditor and seal of the department which makes the transcript evidence, and neither must be omitted. (Smith v. United States, 5 Pet. 292.) It is admissible although signed by the chief clerk of the treasury. (Smith v. United States, 5 Pet. 292.) It is evidence that an officer received money charged against him (Bruce v. United States, 17 How. 437); it is competent whenever the party is charged with money advanced to him by the United States, for which he has to account (United States v. Lee, 2 Cranch C.C. 462; Fed. Cas. No. 15585); but if the receipt is not acknowledged by him in his returns, or the money charged was not regularly advanced, it is not competent without other evidence of the items. (United States v. Hilliard, 3 McLean, 324; Fed. Cas. No. 15368.) If all the items on which the balance is struck are regularly entered and brought forward, the statement is competent evidence (Gratiat v. U. S., 15 Pet. 336); and it is sufficient if it contains the accounts, debts, and credits, as acted upon

by the accounting officers. (Hoyt v. U. S., 10 How. 109; U. S. v. Patterson, Gilp. 44, Fed. Cas. No. 16008; U. S. v. Martin, 2 Paine, 68, Fed. Cas. No. 15732.) So a transcript from the ledger is admissible. (U. S. v. Gaussen, 19 Wall. 198.) The statement is prima facie evidence only. (U. S. v. Gaussen, 19 Wall. 198; U. S. v. Eckford, 1 How. 250; U. S. v. Corwin, 1 Bond, 149, Fed. Cas. No. 14870; U. S. v. Reymert, 1 Int. Rev. Rec. 63, Fed. Cas. No. 16149.) It is sufficient evidence although the debtor did not have notice of the adjustment of his account. (Watkins v. U. S., 9 Wall. 759.) It can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department on whose books the transactions are shown (U. S. v. Buford, 3 Pet. 12; U. S. v. Jones, 8 Pet. 375); but a disbursement made on a bill of exchange cannot be proved by the statement alone. (U. S. v. Jones, 8 Pet. 375.) So if an account does not arise in the ordinary mode of doing business in the department, its transcript is not competent evidence to establish it. (U. S. v. Buford, 3 Pet. 12.) The transcript must be made "from the books," and not of the books (U. S. v. Gaussen, 19 Wall. 198); and the act making such transcript evidence does not mean a statement of an account in gross, but a statement of the items acted upon by the accounting officers. (U. S. v. Jones, 8 Pet. 375; U. S. v. Vanzandt, 2 Cranch C. C. 338, Fed. Cas. No. 16611; U. S. v. Kuhn, 4 Cranch C. C. 401, Fed. Cas. No. 15545; U. S. v. Edwards, 1 McLean, 467; Fed. Cas. No. 15026.) A certified copy of the account rendered by the principal is competent evidence against the surety. (U. S. v. Vanzandt, 2 Cranch C. C. 338, Fed. Cas. No. 16611; U. S. v. Gaussen, 19 Wall. 198.) If an error is made in favor of sureties, it may be corrected and the balance stated (Soule v. U. S., 100 U. S. 8); but the accounting officers having once

stated an account, they cannot subsequently vary the debit side to the prejudice of the debtor (U. S. v. Collier, 3 Blatchf. 325, Fed. Cas. No. 14833; Ex parte Randolph, 2 Brock. 447, Fed. Cas. No. 11558); and defendant, by accepting the credits given him, does not waive any objection to items on the debit side. (U. S. v. Jones, 8 Pet. 375.) The officers of the treasury may certify facts within their official knowledge (U. S. v. Jones, 8 Pet. 375; U. S. v. Kuhn, 4 Cranch C. C. 401, Fed. Cas. No. 15545); and if the transcript shows the capacity in which defendant acted, it is evidence of such fact. (Smith v. U. S., 5 Pet. 292.) Where the government holds a person responsible for the acts of his agent, the agency must be made to appear by a certified copy of the power. (U. S. v. Jones, 8 Pet. 375.) A transcript of the amount expended by the officers on default of a contractor to furnish articles according to contract is competent evidence. (U. S. v. Griffith, 2 Cranch C. C. 366, Fed. Cas. No. 15263.) If a bond is annexed to the transcript it may properly be certified as a part of it. (Chadwick v. U. S., 3 Fed. Rep. 752.) A copy of an official bond certified by the register of the treasury under seal of the department is sufficient proof of its execution. (U. S. v. Humason, 8 Fed. Rep. 71; 7 Saw. 252.) In a suit by the government on the bond of a postmaster to recover a balance due from him, a duly certified transcript of the books of the treasury department showing the account between such postmaster and the United States is competent evidence and is sufficient to establish a prima facie case, though open to rebuttal (United States v. Carlovitz, 80 Fed. Rep. 852).

§ 407.—Transcripts—Books of the treasury.—Upon the trial of any indictment against any person for embezzling public moneys, it shall be suffi-

cient evidence for the purpose of showing a balance against such person to produce a transcript from the books and proceedings of the treasury department, as provided by the preceding section. (Rev. Stats. sec. 887.)

§ 408. **Copies of returns in returns office.**—A copy of any return of a contract returned and filed in the returns office of the department of the interior, as provided by law, when certified by the clerk of said office to be full and complete, and when authenticated by the seal of the department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns office. (Rev. Stats. sec. 888.)

§ 409. **Copies of postoffice records.**—Copies of the quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account books of the postoffice department, when certified by the sixth auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as

to proceedings in such civil suits. (Rev. Stats. sec. 889.)

Note.—A statement of account is competent evidence, although it does not purport to contain the credits claimed and allowed (U. S. v. Harrill, 1 McAll, 243, Fed. Cas. No. 15310), or the credits claimed and disallowed. (U. S. v. Hodge, 13 How. 478; see U. S. v. Hilliard, 3 McLean, 324, Fed. Cas. No. 15368.) An account which gives the balances as due on the quarterly returns is sufficient. (U. S. v. Hodge, 13 How. 478; Lawrence v. U. S., 2 McLean, 581, Fed. Cas. No. 8145; U. S. v. Hilliard, 3 McLean, 324, Fed. Cas. No. 15368; U. S. v. Harrill, 1 McAll. 243, Fed. Cas. No. 15310; Postmaster-General v. Rice, Gilp. 554, Fed. Cas. No. 11312.) So a certificate that a paper is a true and correct copy of the account is sufficient (U. S. v. Harrill, 1 McAll. 243, Fed. Cas. No. 15310), and a copy of the bond duly authenticated is competent evidence. (U. S. v. Wilkinson, 12 How. 246.)

§ 410. Copies of statements of demands by postoffice department.—In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the postmaster-general or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the postoffice where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions—

shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due. (Rev. Stats. sec. 890.)

§ 411. Copies of records, etc., of general land office.—Copies of any records, books, or papers in the general landoffice, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record. (Rev. Stats. sec. 891.)

Copies of records, etc., in land-office.—An exemplification of any record or paper of record in the land-office is evidence of equal dignity with the original (Lee v. Getty, 26 Ill. 76; Davis v. Freeland, 32 Miss. 645), as of a patent certified by the commissioner of the general land-office (Hines v. Greenlee, 3 Ala. 73; Smith v. Mosier, 5 Blackf. 51; Stephenson v. Wait, 8 Blackf. 508; Lane v. Bonmielman, 17 Ill. 95; Lacey v. Davis, 4 Mich. 140; Barton v. Murrain, 27 Mo. 235; Avery v. Adams, 69 Mo. 603); but this section does

not dispense with signing and countersigning the patent (McGarrahan v. Mining Co., 96 U. S. 316); but if it is signed and countersigned, and verified by the seal of the general land-office, it is competent evidence. (Bowser v. Warren, 4 Blackf. 522.) The form of the certificate is regulated by act of Congress, and is not affected by State laws. (Gilman v. Riopelle, 18 Mich. 145); and a certificate by the acting commissioner under seal of the general land-office is sufficient. (Stephens v. Westwood, 25 Ala. 716.) The seal and the signature of the commissioner prima facie prove themselves. (Harris v. Barnett, 4 Blackf. 369; Bowser v. Warren, 4 Blackf. 522.) A paper may be admitted in evidence, although it contains matters which the certificate does not cover, if authenticated in due form. (Gilman v. Riopelle, 18 Mich. 145.) So a copy of a plat and description duly authenticated is admissible in evidence. (Harris v. Barnett, 4 Blackf. 369; see Godfrey v. Beardsley, 2 McLean, 412, Fed. Cas. No. 5497.) The documents which make up the original title papers belong to the public archives, and a certified copy thereof is competent evidence (Hanrick v. Barton, 16 Wall. 166); or a certificate of the receiver that a party has made full payment is evidence that he has taken the necessary steps for a pre-emption (McDonald v. Edmunds, 44 Cal. 328); but a copy of a final certificate and an assignment thereof is not competent evidence to prove the assignment (Scott v. Hancock, 3 Stew. & P. 44); nor is a letter of a commissioner to a register and receiver not duly authenticated admissible to prove the facts therein stated. (Bovee v. McLean, 24 Wis. 225.) This section is ample authority for the introduction in evidence of the transcript of the German land-office. (Culver v. Uthe, 133 U. S. 655.)

§ 412. Copies of records, etc., of patent office.—Written or printed copies of any records, books,

papers, or drawings belonging to the patent office, and of letters patent authenticated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof. (Rev. Stats. sec. 892.)

Copies of record.—A demand for a copy of a record, accompanied by rudeness and insult, is not a legal demand; nevertheless a party on a second demand is entitled to a copy, and it is error to refuse to comply. (Boyden v. Burke, 14 How. 575.) An exemplification of a patent and the specification is admissible in evidence, although the drawing is not exemplified (Peck v. Farrington, 9 Wend. 44); but a copy of the specification alone is not competent, the proper evidence being the patent itself, duly authenticated by the official seal and certificate of the commissioner. (Davis v. Gray, 17 Ohio St. 330.) A transcript of certain documents on file in the patent office is competent, although not a transcript of the whole proceeding. (Toohey v. Harding, 1 Fed. Rep. 174; 4 Hughes, 253.) A certified copy of an assignment is prima facie evidence of the genuineness of the original. (Lee v. Blandy, 1 Bond, 361, Fed. Cas. No. 8182; Brooks v. Jenkins, 3 McLean, 432, Fed. Cas. No. 1953; Parker v. Haworth, 4 McLean, 370, Fed. Cas. No. 10738); but a certified copy of a transfer not required by law to be recorded is not legal proof of the transfer. (Sherman v. Champlain Co., 31 Vt. 162.) Where a party desires to prove a negative, as that there is no record, he must do so by the deposition of the proper officer, and by producing him in court to be examined (Stoner v. Ellis, 6 Ind. 152; Bullock v. Wallingford, 55 N. H. 619); and a mere certificate

that diligent search has been made is not sufficient. (Bullock v. Wallingford, 55 N. H. 619.) Certified copies of patents are admissible in evidence in all cases where the originals would be admitted. (Schoerken v. The Swift etc. Co., 7 Fed. Rep. 469; 19 Blatchf. 209.)

§ 413. **Copies of foreign letters patent.**—Copies of the specifications and drawings of foreign letters patent, certified as provided in the preceding section, shall be *prima facie* evidence of the fact of the granting of such letters patent, and of the date and contents thereof. (Rev. Stats. sec. 893.)

Note.—Authenticated copies of foreign patents are prima facie evidence of the granting thereof. (Schoerken v. The Swift etc. Co., 7 Fed. Rep. 470; 19 Blatchf. 209.)

§ 414. **Printed copies of specifications and drawings of patents.**—The printed copies of specifications and drawings of patents, which the commissioner of patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerks' offices of the district courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained. (Rev. Stats. sec. 894.)

§ 415. **Extracts from the journals of Congress.**—Extracts from the journals of the senate, or of the house of representatives, and of the executive journal of the senate when the injunction of se-

crecy is removed, certified by the secretary of the senate or by the clerk of the house of representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court. (Rev. Stats. sec. 895.)

§ 416. Copies of records, etc., in offices of United States consuls, etc.—Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such office, shall be admitted in evidence in the courts of the United States. [See sec. 1707.] (Rev. Stats. sec. 896.)

Consul's certificate.—The certificate of a consul is competent evidence to prove his official acts (The Independence, Crabbe, 54, Fed. Cas. No. 2014); but not acts which are not his official acts (The Independence, Crabbe, 54, Fed. Cas. No. 2014); as of the arrival and departure of a vessel, and of the refusal of the master to deposit the register (Levy v. Burley, 2 Sum. 355, Fed. Cas. No. 8300); nor is it competent evidence to prove the facts to justify the imprisonment of a seaman by the master in a foreign port. (Johnson v. The Coriolanus, Crabbe, 239, Fed. Cas. No. 7380.) It is not competent evidence to prove a foreign law. (Church v. Hubbart, 2 Cranch, 187.) It is not evidence of any fact, as between third persons, unless expressly or impliedly so made by statute. (Levy v. Burley, 2 Sum. 355; Fed. Cas. No. 8300; Church v. Hubbart, 2 Cranch, 187; U. S. v. Mitchell, 2 Wash. C. C. 478; Fed. Cas. No. 15791; The Alice, 12 Fed. Rep. 923.) The certificate under seal of his office is

competent evidence to prove the fact that the ship's papers were lodged with him (U. S. v. Mitchell, 2 Wash. C. C. 478; Fed. Cas. No. 15791); or that a seaman was discharged in a foreign port with his own consent. (Lamb v. Briard, Abb. Adm. 367; Fed. Cas. No. 8010.) It is prima facie evidence of the violation of law by a master refusing to receive a destitute seaman in a foreign port when it sets out all the facts essential. (Matthews v. Offley, 3 Sum. 115; Fed. Cas. No. 9290.) Where the impression of the seal on a consular certificate is too indistinct to be deciphered, and the signature vague, it is not admissible in evidence. (The Atlantic, Abb. Adm. 451; Fed. Cas. No. 620.)

§ 417. **Books and papers in offices of certain districts.**—The transcripts into new books, made by the clerks of the district courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa and Kansas, in pursuance of the act of June twenty-seventh, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks of the circuit courts in said districts, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had. (Rev. Stats. sec. 897.)

§ 418. **Transcribed records—North Carolina.**—The transcripts into new books made by the clerks of the circuit and district courts for the western district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit and district courts, respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed. (Rev. Stats. sec. 898.)

§ 419. **When original records are lost or destroyed.**—When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had. (Rev. Stats. sec. 899.)

Note.—Secondary evidence of a judgment is admissible where the record is destroyed. (Cornett v. Williams, 20 Wall. 226.)

§ 420. **Lost records.**—When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had if the same had not been lost or destroyed. (Rev. Stats. sec. 900.)

§ 421. **Lost records of cause.**—When any cause has been removed to the supreme court, and the original record thereof is afterward lost, a duly

certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed. (Rev. Stats. sec. 901.)

§ 422. **Proceeding to restore lost or destroyed records—Notice.**—In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any nonresident of the district in which such court is held anywhere within the jurisdiction of the United States, or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal. (Rev. Stats. sec. 902; 20 U. S. Stats. 277.)

§ 423. **Force and effect of papers restored or supplied.**—A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the

same force and effect as if it were an original report, return, paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to. (Rev. Stats. sec. 903; 20 U. S. Stats. 277.)

§ 424. **Restoration of records—Compensation, etc.**—That whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dock-

ets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by the clerks of said courts, respectively, and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the attorney-general of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund. (Rev. Stat. sec. 904; 20 U. S. Stats. 277.)

§ 425. Authentication of legislative acts and proof of judicial proceedings of States, etc.—The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the

courts of the State from which they are taken. (Rev. Stats. sec. 905.)

Statutes.—An exemplification of a statute under the great seal of State may be given in evidence without further attestation, and the presumption is, that the officer who used the great seal is the person to whom it is confided. (U. S. v. Johns, 4 Dall. 415; S. C. 1 Wash. C. C. 363; Fed. Cas. No. 15481; U. S. v. Amedy, 11 Wheat. 392.) The statute book of a State, purporting to be published by authority of its legislature, and deposited in the department of State, is evidence. (Com. & F. Bank v. Patterson, 2 Cranch C. C. 346; Fed. Cas. No. 3056.) So are the pamphlet laws of a State published by authority and proved to be admissible as evidence in the State. (Rockville & W. T. Co. v. Andrews, 2 Cranch C. C. 451; Fed. Cas. No. 11984; Thompson v. Musser, 1 Dall. 458.) But a printed pamphlet which has no seal affixed, containing the law of another State, is not admissible. (Craig v. Brown, Peters C. C. 354; Fed. Cas. No. 3328.) The Courts of the United States take judicial notice of the public statutes of the several States (Merchant's Exch. Bank v. McGraw, 15 U. S. App. 332; 59 Fed. Rep. 972; Noonan v. Delaware L. & W. R. Co., 68 Fed. Rep. 1; Davidow v. Pennsylvania R. Co., 85 Fed. Rep. 943; L'Engle v. Gates, 74 Fed. Rep. 513), and may take notice of the various statutes which were in force prior to the adoption of the constitution of the United States. (Loree v. Abner, 6 U. S. App. 649; 57 Fed. Rep. 159.)

Authentication of records.—A record must be authenticated according to the form used in the State whence it comes; and the only evidence of this fact is the certificate of the presiding judge (Craig v. Brown, Peters C. C. 354; Fed. Cas. No. 3328), whose official character should appear in the certificate

(Pratt v. King, 1 Or. 49), stating that the attestation is in due form of law. (Trigg v. Conway, Hemp. 538; Fed. Cas. No. 14172.) A certificate by one styling himself "one of the judges" of a court is not sufficient. (Stewart v. Gray, Hemp. 94; Fed. Cas. No. 13428 a; Gardner v. Lindo, 1 Cranch C. C. 78; Fed. Cas. No. 5231.) The seal of the court must be annexed to the record itself; it is not enough that it is annexed to the judge's certificate. (Turner v. Waddington, 3 Wash. C. C. 126; Fed. Cas. No. 14263.) But the record of a court which has no seal may be admitted on such statement in the judge's certificate. (Morgan v. Curtenius, 4 McLean, 366; Fed. Cas. No. 9799.) If the record be duly certified under the act of 1790, no evidence is admissible that the attestation is not in due form. (Ferguson v. Harwood, 7 Cranch, 408.) If the record is properly proved, such proof is of the same nature as an inspection by the court of its own record, and shall have such faith and credit as it has in the State court from whence it was taken (Mills v. Duryee, 7 Cranch, 481; Green v. Sarmiento, 1 Peters C. C. 74; Fed. Cas. No. 5760; 3 Wash. C. C. 17; McElmoyle v. Cohen, 13 Peters, 312; Whitaker v. Bramson, 2 Paine, 209; Fed. Cas. No. 17526); and no greater. (Public Works v. Columbia College, 17 Wall. 521.) It is the uniform practice to follow the requirements of this section as to the certificate of the clerk and judge in authenticating the records and judicial proceedings in the U. S. courts. (O'Hara v. Mobile & O. Ry. Co., 40 U. S. App. 471; 76 Fed. Rep. 719.) The authenticated opinion of the supreme court will not control the official report as published as to differences. (Gamewell Fire Alarm Tel. Co. v. Municipal Signal Co., 77 Fed. Rep. 490; 33 U. S. App. 714.)

Exemplified judgments.—The Federal courts are bound to give to a judgment of a State court the same faith and credit to which it is entitled in the State

courts (Chicago etc. R. R. Co. v. Wiggins' Ferry Co., 108 U. S. 18; Chase v. Curtis, 113 U. S. 452), and the judgments of the courts of the Indian nations in the Indian Territory stand upon the same footing. (Standley v. Roberts, 19 U. S. App. 407; 59 Fed. Rep. 836.) The act of May 26, 1790 (1 Stat. 122), now embodied in section 905 of the Revised Statutes, does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in and impeachable for a manifest fraud. (Cole v. Cunningham, 133 U. S. 107.) It did not make the judgments of the States domestic judgments to all intents and purposes but only gave a general validity, faith, and credit to them as evidence. They enjoy only the right of priority, or privilege, or lien, which the lex fori gives to them by its own laws, in their character of foreign judgments. (McElmoyle v. Cohen, 13 Pet. 312, 328, 329; D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 457; Pennoyer v. Neff, 95 U. S. 714; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292; Christmas v. Russell, 5 Wall. 290; Story on Constitution, secs. 1303 et seq., and Story on Conflict of Laws, sec. 609; Cole v. Cunningham, 133 U. S. 107.) A personal judgment is without validity if rendered by a State court in an action upon a money demand against a nonresident of the State. (D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 457; Hall v. Lanning, 91 U. S. 160; Pennoyer v. Neff, 95 U. S. 714; Guthrie v. Lowry, 84 Pa. St. 533; Scott v. Noble, 72 Pa. St. 115; Noble v. Thompson Oil Co., 79 Pa. St. 354; Steel v. Smith, 7 Watts & S. 447; Bank of U. S. v. Merchants' Bank, 7 Gill, 415; Clark v. Bryan, 16 Md. 171; Weaver v. Boggs, 38 Md. 255.) The circuit court of appeals may determine whether

due force and effect has been given to a judgment or decree of another State. (Merritt v. American Steel Barge Co., 40 U. S. App. 127; 75 Fed. Rep. 813.)

Federal courts.—The words of the statute "in any other court within the United States" make its provisions applicable to the Federal courts as well as to courts of other States (Mills v. Duryee, 7 Cranch, 481; Galpin v. Page, 3 Sawy. 93; Fed. Cas. No. 5206), and to the District of Columbia. (Mills v. Duryee, 7 Cranch, 481.) The transcript of a judgment of a State certified by the clerk is admissible in a Federal court in the same State without any certificate from the judge (Mewster v. Spaulding, 6 McLean, 24; Fed. Cas. No. 9513); but it must be authenticated in accordance with this section to be used in a Federal court sitting in another State (U. S. v. Biebusch, 1 Fed. Rep. 213; 1 McCrary, 42); and the Federal courts will give to the judgments of the State courts only the same faith and credit which the courts of other States are bound to give them. (Pennoyer v. Neff, 95 U. S. 714.)

Extraterritorial effect.—The act makes a judgment or decree evidence of the right established thereby, but gives it no extraterritorial effect. It is not a lien on lands in another State (Green v. Sarmiento, 1 Peters C. C. 74; Fed. Cas. No. 5760; S. C. 3 Wash. C. C. 17); does not operate as a conveyance of real estate, in another State (Watts v. Waddle, 6 Peters, 389; S. C. 1 McLean, 200; Fed. Cas. No. 17295; Tardy v. Morgan, 3 McLean, 358; Fed. Cas. No. 13752), and cannot be enforced by execution in another State. (McElmoyle v. Cohen, 13 Peters, 312.) All courts of justice are bound to take judicial notice of the territorial extent of the governmental jurisdiction as appearing from public legislative acts. (Jones v. United States, 137 U. S. 202.) The provisions of the constitution (art. 4, sec. 1; Act of May 26, 1790, chap. 11; 1 Stats. at

Large, 122; Rev. Stats., sec. 905) establish a rule of evidence, rather than of jurisdiction. Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, differs from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud. (Hanley v. Donoghue, 116 U. S. 1; Wisconsin v. Pelican Ins. Co. of New Orleans, 127 U. S. 265.)

Impeachment.—As to the impeachment in one State of a judgment rendered in another, see, on ground of negligence of attorney, Amory v. Amory, 3 Biss. 266; Fed. Cas. No. 334; counterclaim, Barras v. Bidwell, 3 Woods, 5; Fed. Cas. No. 1039; limitations, Christmas v. Russell, 5 Wall. 290; Bank v. Dalton, 9 How. 522; Bacon v. Howard, 20 How. 22; jurisdiction, Christmas v. Russell, 5 Wall. 290; Knowles v. Gaslight & C. Co., 19 Wall. 58; S. C. 2 Dill. 421; Fed. Cas. No. 8467; Cheever v. Wilson, 9 Wall. 108; nonresidence, Kuhn v. McMillan, 3 Dill. 372; Fed. Cas. No. 7945; plea of nul tiel, Hill v. Mendenhall, 21 Wall. 453; service by publication, Galpin v. Page, 18 Wall. 350; S. C. 3 Sawy. 93; Fed. Cas. No. 5206; Public Works v. Columbia College, 17 Wall. 521; Nations v. Johnson, 24 How. 195; Phelps v. Holker, 1 Dall. 261; service on agent, Warren Manf. Co. v. Etna Ins. Co., 2 Paine, 501; Fed. Cas. No. 17206; Lafayette Ins. Co. v. French, 18 How. 404; S. C. 5 McLean, 461; Fed. Cas. No. 5102; service on one of several partners, Hall v. Lanning, 91 U. S. 160; Burt v. Delano, 4 Cliff. 611; Fed. Cas. No. 2211; fraud, Maxwell v. Stewart, 22 Wall. 77; Randolph v. King, 2 Bond, 104; Fed. Cas. No. 11560; attachment, Maxwell v. Stewart, 22 Wall. 77; Green v. Van Buskirk, 7 Wall. 139; S. C. 2 Keyes, 119; 34 Barb. 457; Warburton v. Aken, 1 McLean, 460; Fed. Cas. No. 17143.

§ 426. **Proofs of records, etc., kept in offices not pertaining to courts.**—All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal of the State or Territory or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken. (Rev. Stats. sec. 906.)

Proofs of records.—A copy of the record of proceedings of a court is not within this section (Carlton v. Briscoe, 1 A. K. Marsh. 67); as a copy of a judgment of a justice of the peace. (Lawrence v. Gaultney, Cheves, 7; Snyder v. Wise, 10 Pa. 157.) A copy of a deed recorded in one State is not admissible in a court of another State without proof that the laws of the other State authorize the record of the instrument. (Powell v. Knox, 16 Ala. 364.) So if certified by the clerk of the court where recorded with the certificate of the governor, it is not admissible. (Leggoo v. Canal Co., 3 La. Ann. 138; Dickson v. Grissom, 4 La. Ann. 538; Condit v. Blackwell, 19 N. J. Eq. 193; Quay v. Eagle F. Ins. Co., Anth. 173, 237*.) The statute does not extend to the exemplification of the record of a deed or other private writing returned to the owner after record. (Russell v. Kearney, 27 Ga. 96.) So a copy of a power of attorney recorded in one State is not evidence to affect land situated in another State. (State v. Engle, 21 N. J. L. 347.) So a copy of a will proved and recorded in one State is not competent evidence in another State. (Hylton v. Brown, 1 Wash. C. C. 298; Fed. Cas. No. 6981; Kelly v. Ross, Busb. 277.) When the record of a will does not appertain to a court, it should be authenticated in conformity with this section. (Ewing v. Savary, 4 Bibb, 424.) So the record of a patent for an office when it does not appertain to a court should be authenticated (Henthorn v. Shepherd, 1 Blackf. 157); but an exemplified copy of a marriage license and certificate duly authenticated is competent evidence. (King v. Dale, 2 Ill. 513.) Unless a guardian's bond is a matter of record it should be certified under this section. (Carlisle v. Tuttle, 30 Ala. 613.) A record may be proved by a sworn copy. (Karr v. Jackson, 28 Mo. 316.)

Certificate.—The mode prescribed in this section is the only mode of authentication, as of a deed (Pen-

nel v. Weyant, 2 Har. (Del.) 501); and the copy thereof is not admissible in another State unless the attestation is in due form. (Drummond v. Magruder, 9 Cranch, 122; Key v. Vaughn, 15 Ala. 497; Johnson v. Fowler, 4 Bibb, 521; Pennel v. Weyant, 2 Har. (Del.) 501; Warren v. Wade, 7 Jones (N. C.) 494; Petermans v. Laws, 6 Leigh, 523; Kidd v. Manley, 28 Miss. 156; Brown v. Edson, 23 Vt. 435.) If a certificate of incorporation is filed in the office of the secretary of State, he need not certify that the attestation is in due form. (Grant v. H. C. Coal Co., 80 Pa. St. 208.) A pardon certified under the great seal of the State is competent evidence. (U. S. v. Wilson, Bald. 78; Fed. Cas. No. 16730.) So a copy of a survey certified by the register and by the judge and by the secretary of State under the great seal is sufficient (Smith v. Redden, 5 Har. (Del.) 321); but a copy of a will and probate attested by the register with the seal of his office is not sufficient. (Ewing v. Savary, 4 Bibb, 424; Smith v. Redden, 5 Har. (Del.) 321.) The clerk's certificate should show that the judge is presiding judge, or that he is presiding judge for the district. (Paca v. Dutton, 4 Mo. 371.)

§ 427. **Copies of foreign records, etc. —Land titles.**—It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments, the solicitor of the treasury, or the commissioner of the general landoffice to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments,

orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the solicitor of the treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals. (Rev. Stats. sec. 907.)

§ 428. **Evidence of United States statutes.**—The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof. (Rev. Stats. sec. 908.)

§ 429. **Printed copies of statutes to be evidence.**—That the said printed copies of the said acts of each session and of the said bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained,

in all the courts of the United States and of the several States therein. (18 U. S. Stats. 114; 28 U. S. Stats. 601.)

§ 429 a. **Supplement of Revised Statutes as evidence.**—The publication of the supplement of Revised Statutes, to include the general laws of the forty-seventh, forty-eighth, forty-ninth, fiftieth, and fifty-first Congresses, and their printing and distribution herein authorized, shall be taken to be *prima facie* evidence of the laws therein contained, but shall not change nor alter any existing law, nor preclude reference to nor control in case of any discrepancy, the effect of an original act passed by Congress. (26 U. S. Stats. 50.)

§ 430. **Revised statutes of United States.**—The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States, and of the several States and Territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress; *provided*, that nothing herein contained shall be construed to change or alter any existing law. (21 U. S. Stats. sec. 380.)

§ 431. **Burden of proof when it lies on claimant in seizure cases.**—In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property

is claimed by any person, the burden of proof shall lie upon such claimant; *provided*, that probable cause is shown for such prosecution, to be judged by the court. (Rev. Stats. sec. 909.)

Note.—See United States v. 740 Tins of Opium (D. C. D. Wash.), 44 Fed. Rep. 998; United States v. 1060 Tins of Opium (D. C. D. Wash.), 44 Fed. Rep. 799.

"Probable cause" does not mean prima facie evidence, but less than evidence which would justify condemnation. (Locker v. U. S., 7 Cranch, 339; The Luminary, 8 Wheat. 407; Woods v. U. S., 16 Peters, 342; The John Griffin, 15 Wall. 29.) Whether probable cause has been shown is a question of law. (Taylor v. U. S., 3 How. 197; Buckley v. U. S., 4 How. 251; Clifton v. U. S., 4 How. 242.) If defendant withholds evidence in his possession, it may be presumed that such evidence is unfavorable to him. (Clifton v. U. S., 4 How. 242.) This section applies to seizures under laws enacted since its adoption. (Cliquot's Champagne, 3 Wall. 114.)

§ 432. **Possessory actions for recovery of mining titles.**—No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. (Rev. Stats. sec. 910.)

CHAPTER XX.

PROCEDURE.

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§ 433. Sealing and testing of writs.—All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the supreme court or a circuit court shall bear teste of the chief justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of the said courts shall be provided at the expense of the United States. (Rev. Stats. sec. 911.)

Note.—The provisions of this section are not abrogated by section nine hundred and fourteen. (Dwight v. Merritt, 18 Blatchf. 305; 4 Fed. Rep. 614; see Whalen v. Sheridan, 18 Blatchf. 324; 10 Fed. Rep. 661.) A writ of error bearing the teste of the clerk, and not of the chief justice of the supreme court, is void. (Wells v. McGregor, 13 Wall. 188.) A summons or notice must be under the seal of the court, and signed by the clerk. (Dwight v. Merritt, 18 Blatchf. 305; 4 Fed. Rep. 614; Peaslee v. Haberstro, 15 Blatchf. 472;

Fed. Cas. No. 10884.) A warrant in admiralty not under seal nor signed by the clerk is not sufficient, although signed by the judge. (Bowler v. Eldridge, 18 Conn. 1.) And if void on its face, it is no protection to the marshal. (Bowler v. Eldridge, 18 Conn. 1.) If a writ of venditioni exponas is regular in all respects, except that it is signed by a deputy clerk in his own name, it is an irregularity that can be taken advantage of only in a direct proceeding. (Griswold v. Connolly, 1 Woods, 193; Fed. Cas. No. 5833; Bragg v. Lorio, 1 Woods, 209; Fed. Cas. No. 1800.) The provisions of this section are held obligatory on parties and courts (Thompson v. Railroad Companies, 6 Wall. 134), but they do not apply to the territories. (Hornbuckle v. Toombs, 18 Wall. 648.) A garnishee summons is process within this section, and must be issued by the clerk. (Middleton Paper Co. v. Rock Riv. P. Co., 19 Fed. Rep. 252.) A paper purporting to be a venire facias tested in the name of the deputy clerk is void. (United States v. Antz, 16 Fed. Rep. 119.)

§ 434. **Teste of process, day of.**—All process issued from the courts of the United States shall bear teste from the day of such issue. (Rev. Stats. sec. 912; 17 U. S. Stats. 197.)

Note.—A writ of error is within this rule. (Atherton v. Fowler, 91 U. S. 143.

§ 435. **Process and proceedings in equity and admiralty.**—The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute

or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States. (Rev. Stats. sec. 913.)

Practice in equity.—The forms and modes of procedure in equity are according to the principles, rules, and usages of the court of chancery in England. (Vattier v. Hinde, 7 Pet. 253; Livingston v. Story, 9 Pet. 632; Van Hook v. Pendleton, 2 Blatchf. 85; Fed. Cas. No. 16852; Hubbard v. Turner, 2 McLean, 519; Fed. Cas. No. 6819; Goodyear v. P. R. Co., 2 Cliff. 351; Fed. Cas. No. 5583; Motte v. Bennett, 2 Fish. Pat. Cas. 642; Fed. Cas. No. 9884.) The remedies at common law and equity are distinguished, and jurisdiction in equity is to be uniform throughout the United States, without modification from state legislation or practice. (United States v. Howland, 4 Wheat. 108; Livingston v. Story, 9 Pet. 632; Green v. Creighton, 23 How. 90; Pomeroy v. Manin, 2 Paine, 476; Fed. Cas. No. 11260; Farmers' L. & T. Co. v. Central R. R. Co., 2 Fed. Rep. 656; Schoolfield v. Rhodes, 82 Fed. Rep. 153.) So State laws affecting remedies have no effect upon the jurisdiction. (Mayer v. Foulkrod, 4 Wash. C. C. 349; Fed. Cas. No. 9341.) So as to the effect of granting an injunction (Boyle v. Zacharie, 6 Pet. 648); and if a bond with sureties be required on granting an injunction, the court cannot give judgment against the obligors on dissolution of the injunction, although it is the practice in the state court. (Bein v. Heath, 12 How. 168; Deakin v. Stanton, 3 Fed. Rep. 435.) State laws providing against foreclosing a mortgage where judgment has been obtained on the debt do not apply (Dow v. Chamberlain, 5 McLean, 281; Fed. Cas.

No. 4037); nor can the circuit court enter a decree for the balance, after exhausting the proceeds of the mortgaged estate. (Noonan v. Lee, 2 Black, 500.) In a bill to quiet title defendant cannot set up a claim for the property and rents. (Hurt v. Hollingsworth, 100 U. S. 100.) If an undertaking is filed to release property from a lien, a decree cannot be made at once against the undertakers on a decree entered against the principal without an express stipulation (Phillips v. Gilbert, 101 U. S. 721); and parties may recede from a stipulation waiving a separate trial of legal and equitable rights. (Hurt v. Hollingsworth, 100 U. S. 100.) Although under the state law interrogatories may be propounded by defendant, yet the practice does not prevail in the Federal Courts. (McDonald v. Smalley, 1 Pet. 620.) So the granting of a new trial instead of a rehearing is erroneous. (U. S. v. Curry, 6 How. 106.) The practice of the court of chancery in England, and not that of the court of exchequer, furnishes the basis of equity practice in United States courts. (Smith v. Burnham, 2 Sum. 612; Fed. Cas. No. 13018.) So circuit courts have power to appoint masters in chancery (Van Hook v. Pendleton, 2 Blatchf. 85; Fed. Cas. No. 16852); or examiners in chancery (Van Hook v. Pendleton, 2 Blatchf. 85; Fed. Cas. No. 16852); or commissioners to take testimony. (Van Hook v. Peddleton, 2 Blatchf. 85; Fed. Cas. No. 16852.) The facts stated as affording grounds for relief must be stated according to their legal effect. (John Hancock Mut. L. Ins. Co. v. Manning, 7 Fed. Rep. 299; Johnston v. Roe, 1 Fed. Rep. 695.) Equity practice in the courts of the United States is regulated by the laws of Congress, and the rules of the United States Supreme Court made under the authority of an act of Congress. (Gaines v. New Orleans, 27 Fed. Rep. 411; United States v. Wilson, 118 U. S. 86. And see United States v. Am. Bell Tele-

phone Co., 29 Fed. Rep. 17; Phelps v. Elliott, 26 Fed. Rep. 881; Nickerson v. Atchison etc. R. R. Co., 30 Fed. Rep. 85; Wells etc. Co. v. Miner, 25 Fed. Rep. 533.)

In admiralty.—The admiralty practice is grafted on the practice in Great Britain, and if a change has taken place the practice of this country takes the precedence. (Manro v. The Almeida, 10 Wheat. 473; The Delaware, Olcott, 240; Fed. Cas. No. 3762.) A district court cannot require stipulators against whom a decree is rendered to appear, to appear in supplementary proceedings. (The Blanche Page, 16 Blatchf. 1; Fed. Cas. No. 1524.) The union of equitable and legal causes of action in one suit is forbidden. (Hurt v. Hollingsworth, 100 U. S. 100. See, generally, Ex parte Phenix Ins. Co., 118 U. S. 610.)

§ 436. Practice of federal courts to conform to State courts.—The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding. (Rev. Stats. sec. 914.)

Section construed.—By section 914 of the United States Revised Statutes the practice, pleadings, and forms and modes of proceeding in Federal Courts are required to conform "as near as may be" to those existing at the time in like causes in the courts of record of the States in which cases are heard. (Robertson v. Perkins, 129 U. S. 233; Lowndes v. Town of Huntington, 153 U. S. 1; Whalen v. Sheridan, 10 Fed.

Rep. 662; 18 Blatchf. 324; Robinson v. Mut. Ben. L. Ins. Co., 16 Blatchf. 201; Fed. Cas. No. 11961; United States v. Brawner, 7 Fed. Rep. 90; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Perry v. Mechanics' Mut. Ins. Co., 11 Fed. Rep. 478.) This applies to the provision in the State statute that allegations of the complaint not denied in the answer must be taken as true. (Robertson v. Perkins, supra.) Where procedure is regulated by a statutory code it governs the practice in courts of the United States sitting therein in common-law cases by virtue of this section. (United States v. Parker, 120 U. S. 89.) So pleadings and practice in an action on the common-law side of the Federal Circuit Court are governed by State law. (Henderson v. Louisville & N. R. Co., 123 U. S. 61; Gamewell Fire Alarm Tel. Co. v. New York, 31 Fed. Rep. 312; Bond v. Dustin, 112 U. S. 604; Glenn v. Sumner, 132 U. S. 152.) As to the sufficiency and scope of pleadings, and the form and effect of verdicts in actions at law, the circuit courts of the United States are governed by the practice of the courts of the State in which they are held. (Glenn v. Sumner, 132 U. S. 152.) The object of the section was to assimilate the form and manner in which the parties should present their claims and defense in the preparation for the trial of suits in the Federal Courts, to those prevailing in the State courts. (Ex parte Chateaugay Ore & Iron Co., 128 U. S. 544; Lamaster v. Keeler, 123 U. S. 376.) This section must be construed in connection with Rev. Stats. sec. 918. (Osborne v. Detroit, 28 Fed. Rep. 385.) The indefiniteness of the expression "as near as may be" gives power to the judge to reject any subordinate provision which, in his judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice. (Gould & T. notes to U. S. Rev. Stat. 285; Indianapolis & St. L. R. Co. v. Horst, 93

U. S. 301; Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co., 31 Fed. Rep. 294; Lowry v. Story, 31 Fed. Rep. 769; Sherry v. Oceanic Steam Nav. Co., 72 Fed. Rep. 565; O'Connell v. Reed, 12 U. S. App. 369; 56 Fed. Rep. 531; Shepard v. Adams, 168 U. S. 618.

In general.—The remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity. (Sheffield Furnace Co. v. Witherow, 149 U. S. 574.) United States Courts conform as near as may be to the practice, pleading, and modes of procedure in civil cases, other than equity or admiralty, with the rules of practice of the States where they are held. (Perry v. Mechanics' Mut. Ins. Co., 11 Fed. Rep. 478.) This section only assimilates the practice as near as may be. (Whalen v. Sheridan, 10 Fed. Rep. 662; 18 Blatchf. 324; Robinson v. Mut. Ben. Ins. Co., 16 Blatchf. 201; Fed. Cas. No. 11961; U. S. v. Brawner, 7 Fed. Rep. 90; see Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291.) It adopts only a statutory procedure and does not include constructions placed upon common law remedies by State courts (Stanford v. Portsmouth, 6 Cent. L. J. 146; Fed. Cas. No. 12315), nor does it apply to cases where Congress has legislated. (Easton v. Hodges, 7 Biss. 324; Fed. Cas. No. 4258; Allnut v. Lancaster, 76 Fed. Rep. 131.) In such case the practice is exclusive, and courts have no power to authorize another mode. (Parsons v. Bedford, 3 Peters, 433; Teese v. Phelps, McAll. 17; Fed. Cas. No. 13818.) The practice and procedure of the State courts is adopted in absence of congressional legislation on the subject (Wear v. Mayer, 6 Fed. Rep. 660; 2 McCrary, 172), and it can go no further than adopt the whole State statute as near as may be. (U. S. v. Brawner, 7 Fed. Rep. 90.) Where Congress by statute points out a specific course of procedure,

or legislates generally on the subject matter, such legislation must be followed. (McNutt v. Bland, 2 How. 17; U. S. v. Pings, 4 Fed. Rep. 714; Dwight v. Merrit, 4 Fed. Rep. 616; 18 Blatchf. 305; citing Easton v. Hodges, 7 Biss. 324; Fed. Cas. No. 4258; Beardsley v. Little, 14 Blatchf. 102; Fed. Cas. No. 1185; U. S. v. Hutton, 25 Int. Rev. Rec. 57; Fed. Cas. No. 15433; Allnut v. Lancaster, 76 Fed. Rep. 131; Ewing v. Burnham, 74 Fed. Rep. 384; United States v. National Lead Co., 75 Fed. Rep. 94.) This section does not apply to a rule of practice of a State court adopted subsequently to an act of Congress regulating the practice in Federal Courts. (Wilcox v. Hunt, 13 Peters, 378.) It does not by implication repeal any previous act of Congress expressly providing a particular mode of proceeding. (Wear v. Mayer, 6 Fed. Rep. 660; 2 McCrary, 172.) This section relates to practice and procedure in suits against parties prosecuted in Federal Courts, but does not extend it over persons and causes not before within the cognizance of the Federal Court. (Bath Co. v. Amy, 13 Wall. 244; Main v. Second Nat. Bank, 6 Biss. 26; Fed. Cas. No. 8976.) Congress did not enlarge the jurisdiction of Federal Courts by adopting the State practice so as to extend it over persons not within the jurisdiction. (Toland v. Sprague, 12 Peters, 300; Main v. Second Nat. Bk., 6 Biss. 26; Fed. Cas. No. 8976; Picquet v. Swan, 5 Mason, 35; Fed. Cas. No. 8976.) The above section does not require Federal Courts to follow State decisions in matters which affect their jurisdiction. (O'Connell v. Reed, 12 U. S. App. 369; 66 Fed. Rep. 531.) The intention is to secure in each State one method of procedure in all common law cases by adopting in general the procedure of the State courts. (Bills v. N. O. St. L. & R. Co., 3 Blatchf. 228; Fed. Cas. No. 1409.) The statute makes a distinction between common law cases and equity and ad-

miralty cases as to forms and modes of procedure. (Steam Stone Cutter Co. v. Sears, 9 Fed. Rep. 9; 20 Blatchf. 23; Sanford v. Portsmouth, 6 Cent. L. J. 147; Fed. Cas. No. 12315; Nudd v. Burrows, 91 U. S. 426; Laidlaw v. Oregon Ry. & Nav. Co., 48 U. S. App. 430; 81 Fed. Rep. 876); and applies solely to common law suits (The Blanche, Page, 10 Blatchf. 5; Fed. Cas. No. 1524), and has no application to equity suits. (Blease v. Garlington, 92 U. S. 1; Brooks v. Vermont C. R. Co., 14 Blatchf. 471; Fed. Cas. No. 1964; Taylor v. Holmes, 14 Fed. Rep. 498; Martindale v. Wass, 11 Fed. Rep. 551; 3 McCrary, 637; Deprez v. Thomson Houston El. Co., 66 Fed. Rep. 22; Schoolfield v. Rhodes, 82 Fed. Rep. 153; Missouri K. & T. Co. v. Krumseig, 40 U. S. App. 620; 77 Fed. Rep. 32; Thomas v. Nantahala M. K. T. Co., 8 U. S. App. 429; 58 Fed. Rep. 485.) It does not authorize legal and equitable remedies to be blended in one suit (Lindsay v. First Nat. Bk., 156 U. S. 485); but substantive rules of equity law administered by the Federal Courts can be abrogated or changed by State statutes. (Missouri K. & T. Co. v. Krumseig, 40 U. S. App. 620; 77 Fed. Rep. 32.) So the practice of allowing ejectments to be maintained on equitable titles cannot affect the jurisdiction of the courts of the United States (Fenn v. Holme, 21 How. 481; Hooper v. Scheimer, 23 How. 235; Sheirburn v. Cordova, 24 How. 423; Robinson v. Campbell, 3 Wheaton, 212); and so to answers of an action at common law, claiming an equitable right. (Dwight v. Merrit, 18 Blatchf. 305; 4 Fed. Rep. 614; Republic Ins. Co. v. William, 3 Biss. 370; Fed. Cas. No. 11707; see Morgan v. Engers, 127 U. S. 63; Schoolfield v. Rhodes, 82 Fed. Rep. 153; Davis v. Davis, 30 U. S. App. 723; 72 Fed. Rep. 81; Johnson v. Merry Mount Granite Co., 53 Fed. Rep. 569.) Where the laws of a particular State give a remedy in equity, as for instance a bill by a party in or out of possession

to quiet title to lands, such remedy will be enforced in the Federal Courts if it does not infringe upon the party's right to a jury trial. (Greeley v. Lowe, 155 U. S. 58.)

Procedure.—The Federal courts will follow the form of action of a State court. (Taylor v. Brigham, 3 Woods, 377; Fed. Cas. No. 13781.) The practice of allowing one suit on a bond against the executor of a deceased obligor together with the surviving obligor may be followed. (U. S. v. Tracy, 8 Ben. 1; Fed. Cas. No. 16536; U. S. v. Lawrence, 14 Blatchf. 229; Fed. Cas. No. 15574.) So a State law which permits a joint action against the maker and indorser may be followed in the Federal courts (Fullerton v. Bank, 1 Pet. 604); and an action of replevin may be sustained when the State law permits it. (Gibbs v. Usher, 1 Holmes, 348; Fed. Cas. No. 5387.) Federal courts may include in one attachment suit debts due and not due without regard to State practice. (Bowden v. Burnham, 19 U. S. App. 448; 59 Fed. Rep. 752.) When pending cases are proceedings at law they are entitled to the benefits of the provisions of this section (Moran v. City of Elizabeth, 9 Fed. Rep. 73), and the first inquiry is, what is the practice in the State courts (Brown v. Phila. & C. Co., 9 Fed. Rep. 185); but a party who has a mere equitable title cannot maintain an action at law (Bennett v. Bitterworth, 11 How. 669; Penn v. Klyne, Peters C. C. 497; Fed. Cas. No. 10935, note; Jones v. McMaster, 20 How. 9; Green v. Mezes, 24 How. 268; U. S. v. King, 7 How. 833; Robinson v. Campbell, 3 Wheat. 212); nor does this section adopt the State law allowing equitable defenses in a legal action. (Montejo v. Owen, 14 Blatchf. 324; Fed. Cas. No. 9722; La Mothe Manuf. Co. v. Nat. Tube Works, 15 Blatchf. 432; Fed. Cas. No. 8033.) Where a State abolishes fictitious proceedings and establishes in their place the action of trespass,

for the purpose of trying the title to lands and recovery of their possession, this section applies. (Sears v. Eastburn, 10 How. 187.) This section applies to mandamus as a remedy to compel municipal corporations to levy a tax to pay a judgment creditor. (U. S. v. City of Keokuk, 6 Wall. 514; see Wisdom v. Memphis, 8 Cent. L. J. 109; Fed. Cas. No. 17903.) Practice in mandamus proceedings when ancillary are not affected by this section (U. S. v. Union Pac. R. R. Co., 2 Dill. 527; Fed. Cas. No. 16599); otherwise they are governed by the State law. (Moran v. City of Elizabeth, 9 Fed. Rep. 72.) A proceeding to restore a lost record is sui generis, and is governed by act of Congress. (Turner v. Newman, 3 Biss. 307; Fed. Cas. No. 14262.)

What not embraced within this section.—The Supreme Court is not governed in the matter of its own process by the varying laws of the States and Territories upon the subject. (Tripp v. Santa Rosa St. R. R. Co., 144 U. S. 126.) Questions of power and authority of the court are not embraced within this section. (Lyons v. Lyons Nat. Bank, 8 Fed. Rep. 373.) This section does not apply to matters which are regulated exclusively by acts of Congress, or, when Congress is silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States. (Ex parte Chateaugay Ore & Iron Co., 128 U. S. 544; Whalen v. Sheridan, 18 Blatchf. 324; 10 Fed. Rep. 661; United States v. Train, 12 Fed. Rep. 852; Lamaster v. Keeler, 123 U. S. 376; Easton v. Hodges, 7 Biss. 324; Fed. Cas. No. 4258; McNutt v. Bland, 2 How. 17; United States v. Pings, 4 Fed. Rep. 715; Dwight v. Merritt, 4 Fed. Rep. 616; 18 Blatchf. 305; Beardsley v. Littell, 14 Blatchf. 102; Fed. Cas. No. 1185; United States v. Hutton, 10 Ben. 268; 25 Int. Rev. Rec. 57; Fed. Cas. No. 15433;

Consumer's Cotton Oil Co. v. Ashburn, 81 Fed. Rep. 331; Ewing v. Burnham, 74 Fed. Rep. 384; United States v. National Lead Co., 75 Fed. Rep. 94.) The personal conduct and administration of the judge in the discharge of his separate functions, is not practice or pleading, or a form or mode of proceeding within the meaning of the terms of this section. (Ex parte Chateaugay Ore & Iron Co., 128 U. S. 544; Nudd v. Burrows, 91 U. S. 426.) The provision in a State statute prescribing that the judge shall require the jury to answer special interrogatories, in addition to finding a general verdict, does not apply to courts of the United States under this section. (Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Newcomb v. Wood, 97 U. S. 581.) This section does not extend to the means of enforcing or revising a decision once made by the Circuit Court, nor does it extend to proceedings to enforce a judgment which is provided for by section 916. (Ex parte Chateaugay Ore & Iron Co., 128 U. S. 544; Lamaster v. Keeler, 123 U. S. 376.) The section does not extend to rules prescribed by a State statute regulating trials, and prescribing that in trials without a jury propositions of law may be submitted to the court and a ruling required in order to lay a foundation for a writ of error. (United States v. Indian Grave Drainage Dist., U. S. App., 85 Fed. Rep. 928.) The section applies to systems of judicial procedure, not to details of doing the business of the courts, which are left to be provided for by rules of court. Rules regulating the time of returning writs and docketing causes are not abrogated by a State statute on that subject. (Ewing v. Burnham, 74 Fed. Rep. 384.) The Federal courts are not required by the above section to adopt every subordinate provision of the State code. (Sherry v. Oceanic Steam Nav. Co., 72 Fed. Rep. 565.)

Joinder of parties.—When the State allows an intervention the same practice may be followed. (Bank v. Labitut, 1 Woods, 11; Fed. Cas. No. 842; Featherman v. Louisiana State Seminary, 2 Woods, 71; Fed. Cas. No. 4713.) A provision as to when an administrator may apply to be made a party is adopted under this section. (Barker v. Ladd, 3 Sawy. 44; Fed. Cas. No. 990.) If all parties liable on a bond may be joined in the State court, they may be joined in the Federal Court (U. S. v. Tracy, 8 Ben. 1; Fed. Cas. No. 16536); and although a bond is made to an agent, the principal may sue in his own name if the State law allows it. (Weed Sew. Mach. Co. v. Weeks, 3 Dill. 261; Fed. Cas. No. 17348.) Where the State law makes an oral transfer by the insured after loss of his right of action on the policy valid, the assignee may sue. (Bennett v. Maryland & F. Ins. Co., 14 Blatchf. 422; Fed. Cas. No. 1321.) Where the State law provides that no action will be defeated on account of misjoinder of parties, the Federal Court will conform to the rule. (Perry v. Mech. Mut. Ins. Co., 11 Fed. Rep. 478.) Although the Federal Courts may not be bound by a State law authorizing a foreclosure suit to be maintained against the administrator without joining his widow and heirs, they will not, in an action to quiet title, overturn a title acquired under a foreclosure in the State courts to which the widow and heirs were not parties. (Hearfield v. Bridge, 67 Fed. Rep. 333.)

Rules of pleading.—All defenses are open to defendant in the circuit court under any form of plea, answer, or demurrer which would have been open to him under like pleading in the courts of the State. (Roberts v. Lewis, 144 U. S. 653.) This section applies to the rules of pleading (Oscanyan v. Winchester Arms Co., 15 Blatchf. 79; Fed. Cas. No. 10600; Taylor v. Brigham, 3 Woods, 377; Fed. Cas. No. 13781; Lewis v. Gould, 13 Blatchf. 216; Fed. Cas. No. 8324),

and to the time of filing the declaration after being returned "summoned" (Ricard v. New Providence, 5 Fed. Rep. 434); but not to the signature to a bill. (Stinson v. Hildrap, 8 Biss. 376; Fed. Cas. No. 13459.) It applies to the mode of amending the complaint as of course (Rosenbach v. Dreyfuss, 1 Fed. Rep. 393; West v. Smith, 101 U. S. 263), as by striking out a plaintiff or adding a plaintiff. (Whitaker v. Pope, 2 Woods, 463; Fed. Cas. No. 17528.) But the right of amendment exists independently of any State statute. (Bowden v. Burnham, 19 U. S. App. 448; 59 Fed. Rep. 752.) Pleadings not authorized in the State court in a like suit will be set aside on motion. (Lewis v. Gould, 13 Blatchf. 216; Fed. Cas. No. 8324.) On removal of a cause no other or different pleadings are necessary. (Merch. & Manuf. Bk. v. Wheeler, 13 Blatchf. 218; Fed. Cas. No. 9439.) This section does not apply to the rule of setoff, which is exclusively under the laws of the United States. (U. S. v. Robeson, 9 Peters, 319.) If the State law allows a party to take advantage of the statute of limitations by demurrer, he may do so in the federal courts. (Chemung Canal Bk. v. Lowrey, 93 U. S. 72.) In common-law actions, the sufficiency of the pleadings is to be determined by the State code of procedure. (Castro v. De Uriarte, 12 Fed. Rep. 251; Rush v. Newman, 12 U. S. App. 635; 58 Fed. Rep. 158.) So of the sufficiency of a plea. (U. S. v. Tilton, 7 Ben. 306; Fed. Cas. No. 16525.) Provisions as to pleadings in the United States courts, found in United States Revised Statutes, section 4920, which was passed in 1874, must control the general provisions of section 914, passed in 1872. (Myers v. Cunningham, 44 Fed. Rep. 346.) Though a defendant be permitted by the State practice and rules of pleading to unite a plea to the jurisdiction with pleas to the merits, he need not necessarily do so. (Jones v. Rowley, 73 Fed. Rep. 286.) A State statute allowing a champertous agreement

to be set up in a plea in abatement in the action to which it relates is not a rule of practice, and is not binding on the Federal courts. (Byrne v. Kansas City, Ft. Scott S. & M. Co., 55 Fed. Rep. 44.) The practice of the State is controlling as to the form of the action. (Lowndes v. Town of Huntington, 153 U. S. 1.)

Practice.—It applies to the requirement to answer interrogatories as a substitute for a bill of discovery (Bryant v. Leyland, 6 Fed. Rep. 126), and to ordering a proceeding to substitute one defendant for another (Harris v. Hess, 10 Fed. Rep. 263; 20 Blatchf. 253) and to all motions at common law required by the practice at a special term of the State court, in a stated term of the Federal court (Emma S. M. Co. v. Park, 14 Blatchf. 411; Fed. Cas. No. 4467; Nazro v. Crogin, 3 Dill. 474; Fed. Cas. No. 10062; Republic Ins. Co. v. Williams, 3 Biss. 370; Fed. Cas. No. 11707), but it does not apply to ordering a peremptory nonsuit against the will of the plaintiff. (Elmore v. Grymes, 1 Peters, 471.) It applies to notice of hearing for the trial of an issue of law on a demurrer (Rosenbach v. Dreyfuss, 2 Fed. Rep. 23); but a State law regulating the filing of a lis pendens does not apply to Federal courts. (Majors v. Cowell, 51 Cal. 478; see U. S. v. Stevenson, 1 Abb. C. C. 495; Fed. Cas. No. 16395.) A State law authorizing dismissal of a suit, and which prohibits reinstatement unless at the next term, is not covered by this section. (Mutual Build. Fund v. Bossieux, 1 Hughes, 386; Fed. Cas. No. 9977.) There is no authority to refer an action to referees without consent of parties, although the State court may (Howe Mach. Co. v. Edwards, 15 Blatchf. 402; Fed. Cas. No. 6784); but if the parties consent the rule of the State applies. (Parker v. Ogdensburgh & L. C. R. Co., 51 U. S. App. 88; 79 Fed. Rep. 817.) This sec-

tion has no reference to the designation of jurors. (U. S. v. Collins, 1 Woods, 499; Fed. Cas. No. 14837.) A State law as to instructions to the jury has no application to Federal courts (Indianapolis & St. Louis R. R. Co. v. Horst, 93 U. S. 291; Hawkin v. Squires, 5 Biss. 186; Fed. Cas. No. 6025; McElwee v. Metropolitan Lumber Co., 37 U. S. App. 266; 69 Fed. Rep. 302; City of Lincoln v. Power, 151 U. S. 436), as the rule that the court may direct a verdict for defendant where the evidence is insufficient to warrant a verdict for plaintiff. (Sloss Iron & Steel Co. v. South Car. & G. R. Co., 42 U. S. App. 748; 85 Fed. Rep. 133.) Questions of power and authority of the court are not embraced within this section. (Town of Lyons v. Lyons Nat. Bk., 8 Fed. Rep. 373; 19 Blatchf. 279.)

This section was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which he is clothed. (U. S. Mut. Acc. Asso. v. Barry, 131 U. S. 100.) A federal court is not required to submit a special verdict as provided by the rules of practice in the State (U. S. Mut. Acc. Asso. v. Barry, 131 U. S. 100); and State constitution cannot, any more than a State statute, prohibit judges of the court of the United States from charging juries with regard to matters of fact. (St. Louis I. M. & S. R. Co. v. Vickers, 122 U. S. 360.) So remedies in the United States courts are at common law or in equity, and are uncontrolled in that particular by the practice of the State courts. (New Orleans v. Louisiana Construction Co., 129 U. S. 45.) Although the forms of proceeding and practice in the State courts have been, as near as may be, adopted in the circuit and district courts of the United States, yet this must not be understood as authorizing an equitable defense to an action at law, or the blending of legal and equitable claims in one suit (Doe v. Roe, 31 Fed. Rep. 97; Herk-

lotz v. Chase, 32 Fed. Rep. 433); but such defense must be enforced by a bill in equity to stay the suit at law. (Wood v. Consolidated Electric Light Co., 36 Fed. Rep. 538.) Equity suits in the Federal courts are regulated, not by a State statute, but by the judiciary acts and the rules of equity practice adopted for and governing said courts. (United States v. American Bell Teleph. Co., 29 Fed. Rep. 17.) Courts of the United States are not governed by the statute or practice of the State courts as to motions for new trial and bills of exceptions. (Fishburn v. Chicago M. & St. P. R. Co., 137 U. S. 60; Hughey v. Sullivan, 80 Fed. Rep. 72; United States v. Seifert Bros. Co., 78 Fed. Rep. 520; United States v. Taafe, 78 Fed. Rep. 524; New York & N. E. R. Co. v. Hyde, 5 U. S. App. 443; 56 Fed. Rep. 188; Lowry v. Mt. Adams & Eden Park I. P. Co., 68 Fed. Rep. 827); but when an action of ejectment is tried in the circuit court, according to the statutory mode of proceeding, that court is governed by the provision of the State statute concerning new trials. (Smale v. Mitchell, 143 U. S. 99.) The Revised Statutes, sections 914, 915, authorizing the practice and procedure in federal courts to conform to those of the respective States, do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings in rem against the property of a nonresident defendant, who has not been personally served or appeared. (Harland v. U. S. Tel. Co., 40 Fed. Rep. 308.) Under the above section, where an assignee of a chose in action cannot sue thereon in his own name in the courts of the State, the same rule is obligatory on Federal courts held within such States. (Nederland Life Ins. Co. v. Hall, 55 U. S. App. 598; 84 Fed. Rep. 278.) A State statute dispensing with the requirement that exceptions to the charge be taken while the jury is at the bar will not be followed by the Federal courts. (Consumer's

Cotton Oil Co. v. Ashburn, 81 Fed. Rep. 331.) The practice in the Federal courts in relation to the inspection of papers for the purpose of aiding a party in preparing for trial is regulated by the practice in the State court. (Frescole v. City of Lancaster, 70 Fed. Rep. 337.)

Rules of evidence.—This section does not extend to rules of evidence (Conn. Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457; Beardsley v. Littell, 14 Blatchf. 102; Fed. Cas. No. 1185; see contra, Hinds v. Keith, 13 U. S. App. 222; 57 Fed. Rep. 10); as state provision for examination of a witness before trial. (Beardsley v. Littell, 14 Blatchf. 102; Fed. Cas. No. 1185.) Such examination of a party before trial is allowed only when depositions before trial are authorized by the Revised Statutes. (Easton v. Hodges, 7 Biss. 324; Fed. Cas. No. 4258; Corbett v. Gibson, 16 Blatchf. 336; Fed. Cas. No. 3222.) If the State law gives the right to a party to require testimony to be taken in writing, this practice must prevail. (Parsons v. Bedford, 3 Pet. 433.) A State statute requiring every deposition intended to be read on the trial to be filed at least one day before the day of trial does not apply to the federal courts. (Walker v. Collins, 13 U. S. App. 222 and 314; 59 Fed. Rep. 70.) The practice in taking depositions is regulated by this section (Sage v. Tauszky, 6 Cent. L. J. 7; Fed. Cas. No. 12214); but not to depositions de bene esse (U. S. v. Tilden, 25 Int. Rev. Rec. 352; Fed. Cas. No. 16522); nor to the mode of executing the commission (U. S. v. Pings, 4 Fed. Rep. 714); nor does it govern the production of books and writings. (Easton v. Hodges, 7 Biss. 324; Fed. Cas. No. 4258.) Where matter, as the production of books and documents, is expressly regulated by Congress, it is not a matter in which by this section the practice of the State courts is adopted. (U.

S. v. Hutton, 10 Ben. 269; Fed. Cas. No. 15433. See. generally, Vance v. Campbell, 1 Black, 427; McNiel v. Holbrook, 12 Pet. 84; Thompson v. Central Ohio R. R. Co., 6 Wall. 134.) State rules are always followed in commercial cases. (Wright v. Bales, 2 Black, 535.) But it is only in cases not provided for in the statutes of the United States that the laws of the State in which the court is sitting prevail. (King v. Worthington, 104 U. S. 44; Potter v. Third Nat. Bank of Chicago, 102 U. S. 163; Ex parte Fisk, 113 U. S. 713.)

Judgments and decrees.—A judgment may be entered according to the facts alleged and proved, without regard to the form of pleading if it is the practice under the State law. (Whalen v. Sheridan, 10 Fed. Rep. 661; 18 Blatchf. 324.) A judgment may be entered against one of several defendants, if the State law permits it. (Sawin v. Kenny, 93 U. S. 289.) A judgment may be entered against sureties on a supersedeas bond after a return of nulla bona, if the State law permits it. (Hiriart v. Ballou, 9 Pet. 156; Smith v. Gaines, 93 U. S. 341.) So if the State law permits judgment against a marshal on motion for money not paid over (Gwin v. Breedlove, 2 How. 29); but it cannot enforce against a marshal a penalty allowed by a State law for omitting to pay over money collected on execution. (Gwin v. Breedlove, 2 How. 29.) It is irregular to enter judgment on a referee's report without an application to the court, that being the practice in the State court. (Fourth Nat. Bank v. Neyhardt, 13 Blatchf. 393; Fed. Cas. No. 4991.) Judgments and decrees are liens when made so by State statutes. (Ward v. Chamberlain, 2 Black, 430.) A State law requiring a judge to give his decision in writing is not binding on the Federal courts. (Martindale v. Wass, 11 Fed. Rep. 551; 3 McCrary, 637.) If an order against a garnishee is not a judgment un-

der State law, it is not in the Federal courts. (Atlantic & Pac. R. Co. v. Hopkins, 94 U. S. 11.) The Federal courts follow the State practice as to allowance of interest on judgments. (Moran v. Hagerman, 69 Fed. Rep. 427.) The practice of a State court in opening judgments or decrees by default after the term at which they became absolute will not be observed in a suit in equity in a Federal court. (Austin v. Riley, 55 Fed. Rep. 833.)

Writs of error and review.—This section does not extend to enforcing or revising decisions once made. (U. S. v. Train, 12 Fed. Rep. 853.) The rules of State practice have no application to writs of error or bills of exceptions. (Whalen v. Sheridan, 18 Blatchf. 308; S. C. 5 Fed. Rep. 436; Marye v. Strouse, 5 Fed. Rep. 494; Muller v. Ehlers, 91 U. S. 251.) Appellate proceedings in the Federal courts are not controlled by State practice. (Kentucky Life & Acc. Ins. Co. v. Hamilton, 22 U. S. App. 386 and 548; 63 Fed. Rep. 93; Fleitas v. Richardson, 147 U. S. 538; Duncan v. Atchison T. & Santa Fe R. Co., 44 U. S. App. 427; 72 Fed. Rep. 808.) And the State law allowing a second trial is not applicable. (Newcomb v. Wood, 97 U. S. 581; Cady v. Phoenix F. Ins. Co., 18 Int. Rev. Rec. 30; Fed. Cas. No. 2284.) It is doubtful whether cases tried in the circuit court by a referee, in States where such a practice exists, can be reviewed in the supreme court. (Boogher v. Life Ins. Co., 103 U. S. 90; see Bridges v. Sheldon, 18 Blatchf. 295; 7 Fed. Rep. 17; Robinson v. Mut. Ben. L. Ins. Co., 16 Blatchf. 194; Fed. Cas. No. 11961.) There is nothing in this section which extends to or affects the power of Federal courts on a writ of error. (Town of Lyons v. Lyons Nat. Bank, 8 Fed. Rep. 369; 19 Blatchf. 279; Whalen v. Sheridan, 18 Blatchf. 308; 5 Fed. Rep. 436. See Baker v. Power, 124 U. S. 167.) What constitutes the final record in the circuit court is a matter controlled by State statute,

when covered by such a statute. (Smith v. McIntyre, 84 Fed. Rep. 721.) The practice in the circuit courts embracing the preparation, settling and signing of bills of exception is not governed by the rules of the State courts. (Prichard v. Budd, 42 U. S. App. 186; 76 Fed. Rep. 710.) The question of what constitutes a final decree for the purposes of appeal is not governed by procedure in the State courts. (Elder v. McClaskey, 37 U. S. App. 1, 199; 70 Fed. Rep. 529.)

Costs.—A decision of the supreme court of a State that a provision in a mortgage, to the effect that in case of foreclosure, a certain sum therein named should be allowed as attorney's fees was invalid, is binding on the Federal courts. (Gray v. Havemeyer, 10 U. S. App. 456; 53 Fed. Rep. 174; Willard v. Serpell, 62 Fed. Rep. 625.)

Forms of State process.—The forms of process for commencement of suits conform to the State process under this section, except as to the signature of the attorney, which is provided for by act of Congress, section 911, Revised Statutes (Brown v. Pond, 5 Fed. Rep. 37; see Ricard v. New Providence, 5 Fed. Rep. 434): but it does not authorize commencement of an action by summons in the name of plaintiff's attorney, although authorized by State laws. (Martin v. Criscuola, 10 Blatchf. 211; Fed. Cas. No. 9159.) It adopts the effect as well as the form of the State process. (Bank of U. S. v. Halstead, 10 Wheat. 51.) A rule of the district court for the service of process need not strictly conform to State statutes on the subject, but the court may legitimately exercise a discretion as to the conformity. (Shepard v. Adams, 168 U. S. 618.) Under this section old forms of process for the commencement of common-law actions have been superseded by summons, except as to the mode of attesta-

tion, which is provided for by Revised Statutes, section 911 (Brown v. Pond, 5 Fed. Rep. 37; Peaslee v. Haberstro, 15 Blatchf. 472; Fed. Cas. No. 10884; Dwight v. Merritt, 18 Blatchf. 305; 4 Fed. Rep. 614), which section is not inconsistent with or repealed by this section. (Dwight v. Merritt, 18 Blatchf. 306; 4 Fed. Rep. 614; Peaslee v. Haberstro, 15 Blatchf. 472; Fed. Cas. No. 10884.) Attachment process and procedure are adopted by this section. (Steam Stone Co. v. Sears, 9 Fed. Rep. 8.) But an affidavit for garnishment is amendable in the Federal court, notwithstanding the decisions of the State court hold it to be not amendable. (Booth v. Denike, 65 Fed. Rep. 43.) It applies to process by which suits are brought and its mode of service (Brownell v. Troy & Boston R. Co., 18 Blatchf. 245; 3 Fed. Rep. 761; Dwight v. Merritt, 18 Blatchf. 305; 4 Fed. Rep. 614; Springer v. Foster, 2 Story, 383; Fed. Cas. No. 13266; Perkins v. Watertown, 5 Biss. 320; Fed. Cas. No. 10991) to a writ of scire of facias in reciting a judgment on a prior scire facias. (Brown v. Chesapeake etc. C. Co., 4 Fed. Rep. 771.) A suit for a penalty in the circuit court, as provided by act, 1885, chapter 164, section 3, for violation of the alien contract labor laws may be properly begun by capias in accordance with State laws. (United States v. Banister, 70 Fed. Rep. 44.) Where State laws allow a subpoena to be served by a private person, such service is good in the Federal courts. (Cummings v. Akron C. & P. Co., 6 Blatchf. 509; Fed. Cas. No. 3473; Shwabacker v. Reilly, 2 Dill. 127; Fed. Cas. No. 12501.) Process may be served by the marshal, or his deputy, notwithstanding the State law as to a private person. (Shwabacker v. Reilly, 2 Dill. 127; Fed. Cas. No. 12501.) State laws as to exemption from levy and sale on execution will be followed. (In re Vogler, 2 Hughes, 297; Fed. Cas. No.

16986; In re Appold, 6 Phila. 469; In re Ruth, 6 Phila. 438; Fed. Cas. No. 12172.) So, also, as to the notice and mode and time of sale under execution. (Moncure v. Zunts, 11 Wall. 416; Smith v. Cockrill, 6 Wall. 756; Pollard v. Cocke, 19 Ala. 188; Merchants' Bank v. Evans, 51 Mo. 335.) If a State law requires an appraisal and sale at a certain price, a marshal's sale must conform to such law. (Smith v. Cockrill, 6 Wall. 756.) All the requisites under the State law must be observed. (Byers v. Fowler, 12 Ark. 218; Pollard v. Cocke, 19 Ala. 188; Merchants' Bank v. Evans, 51 Mo. 335.) Process substantially in compliance with State laws will not be set aside. (Johnson v. Healy, 9 Ben. 318; Fed. Cas. No. 7389.) Property under the State law subject to a levy may be taken on process issued out of the Federal court. (Georgia v. Atlantic & G. R. R. Co., 3 Woods, 434; Fed. Cas. No. 5351.) Property exempt from execution under the State laws is exempt under execution issued out of a federal court. (In re Ruth, 1 Bank. Reg. 154; Fed. Cas. No. 12172.) A levy cannot be made on an insolvent administrator. (Williams v. Benedict, 8 How. 107.) A creditor cannot sell the property after appointment of a receiver without leave of the State court. (Wiswall v. Sampson, 14 How. 52.) So execution cannot be issued to affect property of a corporation in the hands of a receiver. (Levi v. Columbia F. Ins. Co., 1 Fed. Rep. 206; 1 McCrary, 34.) Property vested in a syndicate in insolvency proceedings cannot be levied on by process from the Federal court. (Bank v. Horn, 17 How. 160.) Property exclusively under control of the probate court is not subject to execution on a judgment against an administrator in the circuit court. (Yonley v. Lavender, 21 Wall. 276; Kittredge v. Race, 92 U. S. 116.) A return of property taken on a fi. fa. on execution of a forthcoming bond is governed by the

State law. (Amis v. Smith, 16 Peters, 303.) State laws regulating final process have no application unless adopted by some act of Congress. (Wayman v. Southard, 10 Wheat. 1; Ross v. Duval, 13 Peters, 45; Boyle v. Zacharie, 6 Peters, 648.) So property levied on cannot be proceeded against according to the law of a State. (Hall v. Yahoola R. M. Co., 1 Woods, 544; Fed. Cas. No. 5955.) Goods delivered to defendant on a forthcoming bond in replevin cannot be taken in replevin from federal courts. (U. S. v. Dantzler, 3 Woods, 719; Fed. Cas. No. 14917.) The principle of this section is applicable only where there is no rule on the same subject prescribed by act of Congress, and where the State rule is not in conflict with any such law. (Ex parte Fisk, 113 U. S. 713; and see Bond v. Dustin, 112 U. S. 604.) The section does not apply to the form of verdicts, or to the manner of giving instructions in the federal courts (Abbott v. Curtis etc. Manuf. Co., 25 Fed. Rep. 402); nor does it apply to remedies upon judgments, those remedies being governed by the provisions of section 916 (Lamaster v. Keeler, 123 U. S. 376); nor do its provisions adopt the State law allowing equitable defenses in a legal action. (Herklotz v. Chase, 32 Fed. Rep. 433.) This section applies to the mode of service of process on corporations as well as on persons. It is a part of the practice and mode of proceeding in a suit. (Amy v. Watertown, 130 U. S. 301.) Where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations. (Kibbe v. Benson, 17 Wall. 624; Alexandria v. Fairfax, 95 U. S. 774; Settlemier v. Sullivan, 97 U. S. 444; Evans v. Dublin & D. R. Co., 14 Mees. & W. 142; Walton v. Universal Salv. Co., 16 Mees. & W. 438; United Associated Press v. Times Printing Co., 83 Fed. Rep. 822.)

§ 436 a. **Procedure in partition suits where United States is a party.**—That when such suit [for partition of land] is brought by any person owning an undivided interest in such land, other than the United States, against the United States alone, or against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, and by mailing a copy of the same by registered letter to the attorney-general of the United States; and the complainant in such bill shall file with the clerk of the court in which such bill is filed an affidavit of such service and of the mailing of such letter. It shall be the duty of the district attorney upon whom service of the bill is made as aforesaid, to appear and defend the interests of the Government, and within sixty days after service upon him as hereinabove prescribed, unless the time shall be enlarged by order of the court made in the case, to file a plea, answer, or demurrer on the part of the Government, and the cause shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons. Whenever in such suit the court shall order a sale of the property or any part thereof, the attorney-general of the United States may, in his discretion, bid for the same in behalf of the United States. If the United States shall be the purchaser, the amount of the

purchase money shall be paid from the treasury of the United States upon a warrant drawn by the secretary of the treasury on the requisition of the attorney-general. (30 U. S. Stats. 416, sec. 2.)

§ 437. **Attachments.**—In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process; *provided*, that similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy. (Rev. Stats. sec. 915.)

Attachments.—The rule adopting the State laws relating to attachments need not be promulgated in writing; it will be presumed in the appellate court, in the absence of a contrary showing, that such a rule has been adopted by the trial court. (Citizen's Bank v. Farwell, 12 U. S. App. 409; 56 Fed. Rep. 570.) A Federal court cannot issue a writ of attachment before final judgment against a national bank, its jurisdiction in this regard being limited by all the restrictions imposed by statute (U. S. Rev. Stats., sec. 5242) upon State courts. (Butler v. Coleman, 124 U. S. 721; Garner v. Second Nat. Bank, 66 Fed. Rep. 369; but see Hower v. Weiss M. & E. Co., 14 U. S. App. 210; 55 Fed. Rep. 356.) If the circuit or district court

err in granting the relief provided for in the above section, it is simply a matter of error and not one of jurisdiction. (Schunk v. Moline M. & S. Co., 147 U. S. 500.) This section applies only when process in personam has been served on the defendant (Chittenden v. Darden, 2 Woods, 437; Fed. Cas. No. 2688), when the auxiliary remedy by attachment is given (Nazro v. Cragin, 3 Dill. 474; Fed. Cas. No. 10062); and although a resident of the district, defendant cannot be proceeded against by attachment unless served with process in the district (Sadlier v. Fallon, 2 Curt. 579; Fed. Cas. No. 12210), as no writ of attachment can be served on the property of a nonresident until found within the district and served with process in personam (Chittenden v. Darden, 2 Woods, 437; Fed. Cas. No. 2688); but if there are two districts within the State, a judgment creditor of one district may have an attachment in execution on his judgment. (Prevost v. Gorrell, 5 Week. Notes, 151; Fed. Cas. No. 11400.) A court commissioner has no power to issue the writ. (Chittenden v. Darden, 2 Woods, 437; Fed. Cas. No. 2688.) The exercise of the jurisdiction conferred upon the circuit courts by this section necessarily draws to itself everything properly incidental, even though it may bring into the court, for the adjudication of their rights, parties not otherwise subject to its jurisdiction. (Gumbel v. Pitkin, 124 U. S. 131.) A State court has no jurisdiction of an action of replevin to recover property attached under the authority of a Federal court. (Krippendorf v. Hyde, 110 U. S. 276. And see Covell v. Heyman, 111 U. S. 176; Tua v. Carriere, 117 U. S. 201; Beckett v. Sheriff Hartford County, 21 Fed. Rep. 32.) Where a writ of attachment is sued out in a suit, but no property is levied on, the suit stands as if it had been instituted by summons alone. (New York, Lake Erie & W. Ry. Co. v. Estill, 147 U. S. 591.) When by State laws

attachments and executions may be levied on equitable interests in real estate, a bill in aid of an execution or attachment may be entertained in the Federal courts of equity sitting in that State. (Lant v. Manley, 43 U. S. App. 623; 75 Fed. Rep. 627.) The above section does not confer on the United States courts jurisdiction of suits by foreign attachment, or jurisdiction over a nonresident not served with process, though State courts have such jurisdiction under State laws. (Central Trust Co. v. Chattanooga R. & C. R. Co., 68 Fed. Rep. 685.)

§ 438. **Execution in common-law causes.**—The party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise. (Rev. Stats. sec. 916.)

Remedies and rules to govern.—Under this section the construction placed upon the State laws by the highest court of the State, while not binding on the Federal courts, is entitled to great weight. (Sowles v. Witters, 55 Fed. Rep. 159.) Federal courts may adopt rules to regulate proceedings so as to conform to those of the State (Beers v. Haughton, 9 Peters, 329; Ross v. Duval, 13 Peters, 45); but a rule made by a district judge will not be considered binding un-

less he be qualified to exercise the powers of a circuit judge. (Amis v. Smith, 16 Peters, 303.) They may adopt the State law as a whole, but not in part. (McCracken v. Hayward, 2 How. 608.) The power so to adopt the State law extends to future as well as past legislation, and to modes of procedure as well as forms of process. (Ross v. Duval, 13 Peters, 45.) The process on judgment is similar to that allowed in State courts. (U. S. v. Humphreys, 3 Hughes, 201; Fed. Cas. No. 15422.) So a judgment creditor may have the same remedy against a municipal corporation as the State law allows against a private person. (New Orleans v. Morris, 3 Woods, 115; Fed. Cas. No. 10183.) So if the State law allows an attachment on the judgment, the same remedy is available in the Federal courts (Pearce v. Winter Iron Works, 32 Ala. 68); but State rules relating to attachment of mortgaged property do not apply to an attachment issued on a judgment unless adopted. (Howe v. Freeman, 14 Gray, 566.) The Congress adopted both the form and effect of executions as established by State laws. (Koning v. Bayard, 2 Paine, 251; Fed. Cas. No. 7924; see Bank v. Halstead, 10 Wheat. 51; U. S. v. Graves, 2 Brock. 379; Fed. Cas. No. 15250.) So execution cannot be levied on property if the State law prohibits it. (Williams v. Benedict, 8 How. 107.) If the State law provides that a sale on execution discharges all liens, the purchaser under an execution issued by a Federal court obtains a good title. (Brown v. Bacon, 27 Miss. 589.) A sale under a junior judgment in the State court will not prevent a sale under a prior judgment of a Federal court. (Andrews v. Wilkes, 6 How. (Miss.) 554.) The State court will, on sale under a prior judgment, order the surplus to be paid to the marshal. (Coughlan v. White, 66 N. C. 102. See Bonaffee v. Fisk, 13 Smedes & M. 682.) In garnishment proceedings, see Canal & C. Sts. R. R. Co. v.

Hart, 114 U. S. 654. In proceedings supplementary to execution, see Ex parte Boyd, 105 U. S. 647.

Lien of judgment of Federal court.—The lien of judgments on property within the jurisdiction depends upon the State law where Congress has not prescribed a different rule (Williams v. Benedict, 8 How. 107); the proceedings in the Federal courts are governed solely by acts of Congress (Corwin v. Benham, 2 Ohio St. 36); and judgments of Federal courts have the same lien that judgments in the State court have. (Williams v. Benedict, 8 How. 107; Ward v. Chamberlain, 2 Black. 430; Carroll v. Watkins, 1 Abb. U. S. 474; Fed. Cas. No. 2457; Koning v. Bayard 2 Paine, 251; Fed. Cas. No. 7924; Pollard v. Cocke, 19 Ala. 188; Trapnall v. Richardson, 13 Ark. 543; Byers v. Fowler, 12 Ark. 218; U. S. v. Duncan, 12 Ill. 523; Simpson v. Niles, 1 Ind. 196; Sellers v. Corwin, 5 Ohio, 398; Lawrence v. Belger, 31 Ohio St. 175.) Where the State law creates a lien only in the county where judgment is entered, the lien in the federal court is, notwithstanding, to the extent of its territorial jurisdiction in the district (Massingill v. Downs, 7 How. 760; Shrew v. Jones, 2 McLean, 78; Fed. Cas. No. 12818; see Lombard v. Bayard, 1 Wall. Jr. 196; Fed. Cas. No. 8469); so if there is more than one district in the State, when process can be issued throughout the State (Manhattan Co. v. Evertson, 6 Paige, 457), and it is not necessary that a copy be filed with the clerk of any county of the State. (Cropsey v. Crandall, 2 Blatchf. 341; Fed. Cas. No. 3418; Shrew v. Jones, 2 McLean, 78; Fed. Cas. No. 12818; U. S. v. Scott, 3 Woods, 334; Fed. Cas. No. 16242; but see Tarpley v. Hamer, 9 Smedes & M. 310; Reid v. House, 2 Humph. 576.) The lien arises from the fact that its effect, and that of process thereon, are the same as judgments of the State court. (U. S. v. Morrison, 4 Pet. 124; Barth

v. Makeever, 4 Biss. 206; Fed. Cas. No. 1069; U. S. v. Humphreys, 3 Hughes, 201; Fed. Cas. No. 15422; Shew v. Jones, 2 McLean, 78; Fed. Cas. No. 12818; Lombard v. Bayard, 1 Wall. Jr. 196; Fed. Cas. No. 8469.) A levy and sale of lands under a pluries execution while a prior levy remains undisposed of is a mere irregularity which can only be taken advantage of in apt time. (Kerr v. South Park Commrs., 8 Biss. 276; Fed. Cas. No. 7733.) A suit in rem for forfeiture of property by reason of violation of the internal revenue law is a "common-law cause" within the meaning of this section. (A Quant. of Manuf. Tobacco, 10 Ben. 447; Fed. Cas. No. 11499. See act of August 1, 1888.)

§ 438 a. Procedure upon award in controversies between carriers and their employees.—That the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the circuit court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon both parties, unless set aside for error of law apparent on the record.

That the award being filed in the clerk's office of a circuit court of the United States, as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon

the record, in which case said award shall go into practical operation and judgment be entered accordingly when such exceptions shall have been finally disposed of either by said circuit court or on appeal therefrom.

At the expiration of ten days from the decision of the circuit court upon exceptions taken to said award, as aforesaid, judgment shall be entered in accordance with said decision unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said circuit court, judgment pursuant thereto shall thereupon be entered by said circuit court.

If exceptions to an award are finally sustained, judgment shall be entered setting aside the award. But in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award. (30 U. S. Stats., 425, 426.)

§ 439. **Supreme court to regulate the practice of circuit and district courts.**—The supreme court shall have power to prescribe, from time to time,

and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts. (Rev. Stats. sec. 917.)

The power conferred is not only to make rules, but to make them from time to time. (The St. Lawrence, 1 Black, 522.) The supreme court may make rules to regulate mere matters of practice in equity (Pierpont v. Fowle, 2 Wood. & M. 23; Fed. Cas. No. 11152), as by allowing defendant to plead to part of a bill, and demur to a part. (Pierpont v. Fowle, 2 Wood. & M. 23; Fed. Cas. No. 11152.) Such rules are obligatory on the circuit court (Poultney v. La Fayette, 12 Pet. 472; Ex parte Whitney, 13 Pet. 404); and no practice in the circuit court inconsistent therewith is admissible to control them (Bank v. White, 8 Pet. 262); but rules prescribed by the supreme court do not exclude other rules and usages of the circuit courts (Van Hook v. Pendleton, 2 Blatchf. 85; Fed. Cas. No. 16852), as enlarging the time of appearing, and answering when justice requires it (Poultney v. La Fayette, 12 Pet. 472); but the circuit courts have no power to make rules inconsistent with the rules prescribed by the supreme court (Story v. Livingston, 13 Pet. 359; Gaines v. Relf, 15 Pet. 9; Bein v. Heath, 12 How. 168; Jenkins v. Greenwald, 1 Bond, 126; Fed. Cas. No. 7270), as a rule adopting a State law as to the rights and obligations of parties to injunction bonds. (Bien

v. Heath, 12 How. 168.) Rules prescribed by the supreme court have the force and effect of statutory provisions. (The Delaware, Olcott, 240; Fed. Cas. No. 3762; Scott v. The Young America, Newb. Adm. 107; Fed. Cas. No. 12550; Russel v. The Asa R. Swift, Newb. Adm. 553; Fed. Cas. No. 12144; Gaines v. Travis, Abb. Adm. 422; Fed. Cas. No. 5180; The Illinois, 1 Brown Adm. 13; Fed. Cas. No. 7003), but it can make no rule to conflict with an act of Congress (Gray v. C. I. & N. R. R. Co., 1 Wool. 63; Fed. Cas. No. 5713), as a rule making judgments or decrees for money a lien on land, or to displace any land where the same is conferred by law. (Ward v. Chamberlain, 2 Black, 430.) Although it cannot by rule affect the jurisdiction conferred by law, yet it may regulate proceedings and process. (The St. Lawrence, 1 Black, 522.)

§ 440. **Practice in the several courts to be regulated by their own rules.**—The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. (Rev. Stats. sec. 918.)

Rules.—Under this section Federal courts may by rule require parties to print their briefs (Neff v. Pennoyer, 3 Saw. 335; Fed. Cas. No. 10084); or may pass a rule for making up the trial docket, and make

the clerk's fee part of taxable costs (The Alice Taintor, 14 Blatchf. 225; Fed. Cas. No. 196); or a rule which dispenses with proof of execution of a bond, bill, or note, unless defendant files an affidavit denying the execution (Mills v. Bank, 11 Wheat. 431); or it may adopt the form of a bill of exceptions as known at common law (Pomeroy v. State Bank, 1 Wall. 592); but no rule can exclude competent evidence. (Patterson v. Winn, 5 Pet. 233.) Federal courts may regulate their own process, and prescribe rules for the collection and disposition of moneys, and compel their observance by attachment. (The Laurens, 1 Abb. Adm. 508; Fed. Cas. No. 8122.) And with consent of parties a cause may, under a rule, be referred to a referee to hear and report his determination to the court. (Thornton v. Carson, 7 Cranch, 596; Alexandria Canal Co. v. Swann, 5 How. 83; Heckers v. Fowler, 2 Wall. 123.) A court may suspend its rules or except a case from their operation. (U. S. v. Breitling, 20 How. 252; Russell v. McLellan, 3 Wood. & M. 157; Fed. Cas. No. 12158; Wallace v. Clark, 3 Wood. & M. 359; Fed. Cas. No. 17098.) It is not essential that it adopt written rules; it may be established by uniform practice of a series of years. (Fullerton v. Bank, 1 Pet. 604; Duncan v. U. S., 7 Pet. 435; U. S. v. Stevenson, 1 Abb. U. S. 495; Fed. Cas. No. 16395; Koning v. Bayard, 2 Paine, 251; Fed. Cas. No. 7924; Sellers v. Corwin, 5 Ohio, 398.) And a decision on a subject establishes the practice. (Duncan v. U. S., 7 Pet. 435.) Section 914, adopting the practice of the several States, should be construed in connection with this section. (Osborne v. City of Detroit, 28 Fed. Rep. 385.) The power given to the Federal courts to prescribe rules does not authorize a district court to prescribe that among admiralty claims of equal dignity, the first libeling shall be paid first. (Saylor v. Taylor, 42 U. S. App. 206; 77 Fed. Rep. 476.)

§ 441. **Suits for duties, etc.**—All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States. (Rev. Stats. sec. 919.)

§ 442. **Consolidation of revenue seizures.**—Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole must be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them. (Rev. Stats. sec. 920.)

§ 443. **Orders to save costs; consolidation of causes.**—When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so. (Rev. Stats. sec. 921.)

Consolidation to save costs.—If a party has two or more causes of action of the same kind he may be compelled to consolidate and pay the costs of the application. (Bank v. Young, 1 Cranch C. C. 458; Fed. Cas. No. 857; Wolverton v. Lacey, 18 Law Rep. 672;

Fed. Cas. No. 17932.) The practice to consolidate under this section is a common practice. (U. S. v. U. Pac. R. R. Co., 98 U. S. 569.) If several suits involve the same questions, and the attorneys for defendants consent that judgment may abide the event of a trial of one case, an order may be entered that the decree entered in the case selected for trial shall be entered in the other cases. (Andrews v. Spear, 4 Dill. 472; Fed. Cas. No. 380.) So the court may order several actions against several insurance companies to be tried before the same jury if the questions and the evidence are the same and the counsel the same. (Weide v. Insurance Co., 1 Dill. 441; Fed. Cas. No. 17358.) Under the above section it is proper to consolidate an equity suit brought in aid of an attachment, and one to restrain the enforcement of such attachment by execution, and to make the bill in the latter a cross-bill in the former. (Lant v. Kinne, 43 U. S. App. 640; 75 Fed. Rep. 636.)

§ 444. **When the marshal is a party.**—When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them. (Rev. Stats. sec. 922.)

A deputy marshal cannot plead in abatement that the writ was not directed to and served by a disinterested person. (Knox v. Summers, 3 Cranch, 496.)

§ 445. **Seizures for forfeiture in certain cases.**—When any vessel, goods, wares, or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any law respect-

ing the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares, or merchandise, and gives bond to defend the prosecution thereof, and to respond the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law. (Rev. Stats. sec. 923.)

§ 445 a. **Proceedings to restrain combinations in violation of import trade.**—That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act [declaring void agreements in restraint of import trade], and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When

the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (28 U. S. Stats. 570.)

§ 446. **Attachment in postal suits.**—In all cases where debts are due from defaulting or delinquent postmasters, contractors, or other officers, agents, or employees of the post-office department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent, or employee, and his sureties, or either of them, in the following cases:

First. When such officer, agent, or employee, and his sureties, or either of them, is a nonresident of the district where such officer, agent, or employee was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process.

Second. When such officer, agent, or employee, and his sureties, or either of them, has conveyed away, or is about to convey away, his property, or any part thereof, or has removed, or is about to remove, the same, or any part thereof, from the district wherein it is situate, with intent to defraud the United States.

And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in such cases upon due application, and the validity of the warrant first issued shall continue until the return day thereof. (Rev. Stats. sec. 924.)

§ 447. **Application for warrant—Postal suit.**—Application for such warrant of attachment may be made by any district or assistant district attorney, or by any other person authorized by the postmaster-general, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt. (Rev. Stats. sec. 925.)

§ 448. **Issuing warrant in postal suit—Duty of clerk and marshal.**—Upon any such application, and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be exe-

cuted with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court. (Rev. Stats. sec. 926.)

§ 449. **Ownership of attached property—Trial.** —At any time within twenty days before the return day of such warrant, the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached, and a specific return thereof, shall be confined to the remedy herein afforded; but his right to an action of trespass, or other action for damages, shall not be impaired hereby. (Rev. Stats. sec. 927.)

§ 450. **Proceeds of attached property.**—When the property attached is sold on any interlocutory order of the court or is producing any revenue, the money arising from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be

held subject to the orders of the same. (Rev. Stats. sec. 928.)

§ 451. **Publication of attachment.**—Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months, and of nonresidents for four months. The publication shall be made in some newspaper published in the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued. (Rev. Stats. sec. 929.)

§ 452. **Property of defendants—Accounting, etc.**—After the first publication of such notice of attachment as required by law, every person indebted to, or having possessionof any property belonging to, the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to, or having possession of the property of, such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment. (Rev. Stats. sec. 930.)

§ 453. **Discharge of attachment—Bond.**—Upon application of the party whose property has

been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property or to answer any judgment which may be rendered by the court in the premises. (Rev. Stats. sec. 931.)

§ 454. **Accrued rights not to be abridged.**—Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of, or the adoption of State laws by, the United States courts. (Rev. Stats. sec. 932.)

§ 455. **Attachments dissolved in conformity with State laws.**—An attachment of property, upon process instituted in any court in the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the State where said court is held, such attachment would be dissolved upon like process instituted in the courts of said State; *provided*, that nothing herein contained shall interfere with any priority of the United States in the payment of debts. (Rev. Stats. sec. 933.)

Dissolution of attachments.—A motion to discharge an attachment should be supported by an affidavit traversing the facts set out in the affidavit of plaintiff, upon which the attachment was issued. (Jenks v. Richardson, 71 Fed. Rep. 365.) On a motion to dissolve an attachment the sufficiency of the petition as showing a cause of action on the part of plaintiffs, cannot be considered. (Jenks v. Richardson, 71 Fed. Rep. 365.) Under this section an attachment is dissolved in Louisiana by an accepted cession of the attached property to creditors under the insolvency laws of that State. (Schwartz v. Claflin, 13 U. S. App. 707; 60 Fed. Rep. 676.)

§ 456. **Property taken under revenue laws irrepleviable.**—All property taken or detained by any officer or other persons, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. (Rev. Stats. sec. 934.)

Note.—Property levied on by a collector of internal revenue. (O'Reilly v. Good, 42 Barb. 521; Brice v. Elliott, 22 Int. Rev. Rec. 206; Fed. Cas. No. 1854.)

§ 457. **Garnishees in suits by the United States on notes, etc.**—In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of

the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States; *provided*, that no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, or until the sum in which the garnishee stands indebted is actually due. (Rev. Stats. sec. 935.)

§ 458. **Issue tendered when garnishee denies indebtedness.**—When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit. (Rev. Stats. sec. 936.)

§ 459. **Garnishee failing to appear.**—If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court. (Rev. Stats. sec. 937.)

§ 460. **Bailing of property seized under customs laws.**—Upon the prayer of any claimant to the court that any vessel, goods, wares, or mer-

chandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court to administer oaths to appraisers for the faithful discharge of their duty; and the appraisement shall be made at the expense of the party on whose prayer it is granted. If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered, the court shall, by rule, order such vessel, goods, wares, or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court. If judgment passes in favor of the claimant, the court shall cause the said bond to be canceled; but if judgment passes against the claimant, as to the whole or any part of such vessel, goods, wares or merchandise, and the claimant does not, within twenty days thereafter, pay into the court,

or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares, or merchandise so condemned, with the costs, judgment shall be granted upon the bond, on motion in open court, without further delay. [See sec. 570.] (Rev. Stats. sec. 938.)

Security, how taken.—The security may be taken by a sealed instrument or by a stipulation in the nature of a recognizance (The Alligator, 1 Gall. 145; Fed. Cas. No. 248; McLellan v. U. S., 1 Gall. 227; Fed. Cas. No. 8895; The Octavia, 1 Mason, 149; Fed. Cas. No. 10423); but the best course is to take a stipulation. (The Alligator, 1 Gall. 145; Fed. Cas. No. 248.) The stipulation is deemed a mere substitute for the thing itself, and the stipulators are liable to the exercise of all those powers on the part of the court which it could properly exercise if the thing itself were still in its custody. (The Palmyra, 12 Wheat. 1; Newell v. Norton, 3 Wall. 257.) The exercise of authority on the part of court, where the sureties will be affected injuriously, is in the discretion of the court. (The Palmyra, 12 Wheat. 1.) Even without any statute the admiralty may take a stipulation (The Alligator, 1 Gall. 145; Fed. Cas. No. 248; McLellan v. U. S., 1 Gall. 227; Fed. Cas. No. 8895; Place v. Norwich, 1 Ben. 89; Fed. Cas. No. 11202; U. S. v. Four Pieces, 1 Paine, 435; Fed. Cas. No. 15150); and a void bond may be good as a stipulation. (The Alligator, 1 Gall. 145; Fed. Cas. No. 248.) The government has a right to be heard as to the propriety of a delivery on bail, and no delivery ought to be made until all objections have been heard and considered (Ex parte Robbins, 2 Gall. 320; Fed. Cas. No. 11879); and the court may refuse to deliver on a stipulation unless upon condition that it carry interest. (The Santa Maria, 10 Wheat. 431.) Where a vessel libeled for violation of the revenue

laws is released upon a bond of doubtful validity the United States cannot maintain a second libel for other violations of the revenue laws, committed during the same period for which the first libel was filed, without dismissing the first proceeding. (The Haytian Republic, 57 Fed. Rep. 508.) A release bond which contains no condition, and which is for double the value of the vessel, is valid as an obligation to pay at least the value of the vessel. (The Haytian Republic, 57 Fed. Rep. 508.)

Procedure on stipulation.—The court may require full proof of the allegations in the libel (United States v. The Lion, 1 Sprague, 399; Fed. Cas. No. 15607); but if there is no claim no proof of the facts is required. (United States v. The Lion, 1 Sprague, 399; Fed. Cas. No. 15607; The Mary Anne, 1 Ware, 104; Fed. Cas. No. 9195.) If the stipulation is joint and several, libelants may take separate judgments and executions against the surviving parties on the bond or proceed against the representatives. (The Octavia, 1 Mason, 149; Fed. Cas. No. 10423.) Judgment on the bond ought to be in open court after the lapse of twenty days, and not before. (McLellan v. U. S., 1 Gall. 227; Fed. Cas. No. 8895.) Judgment and execution may be awarded in a summary manner on a stipulation. (The Gran Para, 10 Wheat. 497; The Alligator, 1 Gall. 145; Fed. Cas. No. 248; The Baltic, Blatchf. & H. 149; Fed. Cas. No. 826.) The ultimate adjudication of the cause is not complete till judgment is awarded on the bond. (McLellan v. U. S., 1 Gall. 1; Fed. Cas. No. 15165.)

§ 461. **Sale after condemnation.**—All vessels, goods, wares, or merchandise which shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering

and recording, or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale by the person selling the same, to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed. (Rev. Stats. sec. 939.)

§ 462. **In cases of seizure, bailing of property in vacation.**—In any cause of admiralty and maritime jurisdiction, or other case of seizure, depending in any court of the United States, any judge of the said court, in vacation, shall have the same authority to order any vessel or cargo or other property to be delivered to the claimants, upon bail or bond, or to be sold when necessary, as the said court has in term-time, and to appoint appraisers, and exercise every other incidental power neces-

sary to the complete execution of the authority herein granted; and the recognizance of bail or bond, under such order, may be executed before the clerk upon the party's producing the certificate of the collector of the district, of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or of sale as are had in like cases when ordered in term-time; *provided,* that upon every such application, either for an order of delivery or of sale, the collector and the attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases. (Rev. Stats. sec. 940.)

§ 463. **Delivery bond in admiralty proceedings.**—When a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libelant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause. And the owner of any vessel may cause to be executed and de-

livered to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the court in which he is marshal, conditioned to answer the decree of said court in all or any cases that shall thereafter be brought in said court against the said vessel, and thereupon the execution of all such process against said vessel shall be stayed so long as the amount secured by said bond or stipulation shall be at least double the aggregate amount claimed by the libelants in such suits which shall be begun and pending against said vessel; and like judgments and remedies may be had on said bond or stipulation as if a special bond or stipulation had been filed in each of said suits. The court may make such orders as may be necessary to carry this section into effect, and especially for the giving of proper notice of any such suit. Such bond or stipulation shall be indorsed by the clerk with a minute of the suits wherein process is so stayed, and further security may at any time be required by the court. If a special bond or stipulation in the particular cause shall be given under this section, the liability as to said cause on the general bond or stipulation shall cease. [Rev. Stats. § 941, as amended March 3, 1899, 30 U. S. Stats.]

Release of vessel.—Returned to owner (The Old Concord, 1 Brown, 270; Fed Cas. No. 10482; The Union, 4 Blatchf. 90; Fed. Cas. No. 14346), discharged of lien for which seized (The Mutual, 78 Fed. Rep. 144), but subject to all previous liens, and subsequent accruing liens (The Union, 4 Blatchf. 90; Fed. Cas. No. 14346). Court will not order redelivery of vessel

to marshal (The Union, 4 Blatchf. 90; Fed. Cas. No. 14346). And she cannot again be taken for the same cause of action (The Mutual, 78 Fed. Rep. 144). The libelants cannot participate in the proceeds of the sale under a subsequent libel in absence of fraud. (The Madge, 31 Fed. Rep. 926); The Belgenland, 108 U. S. 157). A vessel libeled for forfeiture for violation of neutrality laws may in the court's discretion be released on bond (The Three Friends, 78 Fed. Rep. 173). The right of a vessel owner to give bond and retain possession extends under the above section to possessory actions as well as others; and if he fails to exercise the right he cannot require the libelant to give security for damages caused by seizure. (The Pocónoket, 61 Red. Rep. 106.) A bond in the general form of a common-law bond given to secure the release of a vessel, and approved by the judge and filed with the clerk is within the requirements of the above section, even if given before the vessel is actually arrested, process having been issued to the marshal for that purpose; and a decree and execution thereon may be awarded against the surety without a separate suit. (Munks v. Jackson, 29 U. S. App. 482; 66 Fed. Rep. 571.) A release bond for a vessel seized for violation of the revenue laws, which contains no condition and which is for double the value of the vessel as if drawn under § 941, Rev. Stats., is valid under Rev. Stats., § 938, as an obligation to pay at least the value of the vessel. (The Haytian Republic, 57 Fed. Rep. 508.) A vessel released on bond, it having been seized under a libel of forfeiture for violation of the revenue laws, is not subject to seizure in a different district, under a libel alleging other violations committed during the same period. (The Haytian Republic, 15 U. S. App. 288; 59 Fed. Rep. 476.)

§ 464. Special bail in suits for duties and penalties.—In all suits or prosecutions for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, commenced in any state where, by the laws thereof, imprisonment for

debt shall not have been abolished, the person against whom process is issued shall be held to special bail, subject to the rules which prevail in civil suits in which special bail is required. (Rev. Stats. sec. 942.)

Note.—The marshal may detain the defendant until bail is given, and for that purpose may commit him to prison. (Palmer v. Allen, 7 Cranch, 550; U. S. v. Mundell, 1 Hughes, 415; Fed. Cas. No. 15834.) Bail cannot be required unless the affidavit shows probable cause where the State law so requires. (Leonard v. Caskin, Bee, 146; Fed. Cas. No. 8257.)

§ 465. **Defendant giving bail in one district committed in another.**—When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district, and is committed to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail, or to his attorney, a duplicate

thereof. Upon the return of such certificate, the court which made the said order or any judge thereof, may direct that an *exoneretur* be entered upon the bail piece, where special bail shall have been found, or otherwise discharge such bail. (Rev. Stats. sec. 943.)

§ 466. **Allowing prisoners to escape.**—Whenever any marshal, deputy marshal, ministerial officer, or other person, has in his custody any prisoner by virtue of process issued under the laws of the United States by any court, judge, or commissioner, and such marshal, deputy marshal, ministerial officer, or other person, voluntarily suffers such prisoner to escape, he shall be fined not more than two thousand dollars, or imprisoned for a term not more than two years, or both. (Rev. Stats. sec. 5409.)

§ 467. **Application of preceding section.**—The preceding section shall be construed to apply not only to cases in which the prisoner who escaped was charged or found guilty of an offense against the laws of the United States, but also to cases in which a prisoner may be in custody charged with offenses against any foreign government with which the United States have treaties of extradition. (Rev. Stats. sec. 5410.)

§ 468. **Defendant held until judgment.**—When a defendant is committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be holden in jail until

final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment is rendered against him, in order that he may be charged in execution, which may, in such cases, be directed to and served by the marshal in whose custody he is. (Rev. Stats. sec. 944.)

§ 469. **Bail and affidavits taken by commissioners.**—Bail and affidavits, when required or allowed in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; and such acknowledgments of bail and affidavits shall have the same effect as if taken before any judge of such courts. (Rev. Stats. sec. 945.)

A commissioner may take affidavits in civil proceedings for arrest in conformity with State laws (Fulton v. Gilmore, 10 Chic. L. N. 108; Fed. Cas. No. 5154); but a commissioner in one circuit cannot authenticate a stipulation to take effect in another circuit. (Sawyer v. Oakman, 11 Blatchf. 65; Fed. Cas. No. 12403.) In the absence of a rule of court providing otherwise, appeal bonds may be taken before a United States commissioner. (The Canary, No. 2, 22 Fed. Rep. 536.)

§ 470. **Calling of bail, in Kentucky.**—When a bail bond is given for the appearance of any person to answer in the district or circuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may

afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies. (Rev. Stats. sec. 946.)

§ 471. **When clerks may take bail de bene esse.**—Recognizances of special bail may be taken *de bene esse* by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable. (Rev. Stats. sec. 947.)

§ 472. **Amendment of process.**—Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues. (Rev. Stats. sec. 948.)

Note.—If a summons did not issue from the court, it cannot be amended. (Dwight v. Merritt, 4 Fed. Rep. 614; 18 Blatchf. 305.) The circuit court may allow amendment of a writ of error which is made returnable on the wrong day. (Semmes v. U. S., 91 U. S. 21.)

§ 473. **Priority of State cases.**—When a State is a party, or the execution of the revenue laws of a State is enjoined or stayed, in any suit in a court of the United States, such State, or the party claim-

ing under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties. (Rev. Stats. sec. 949.)

Note.—This statute is not imperative (Hoge v. Richmond & D. R. R. Co., 93 U. S. 1); but a motion cannot be advanced on the calendar, unless made by a state, or a party claiming under the laws of a State. (Ward v. State, 12 Wall. 163.) A motion to give priority to a case is not granted as of course, even with the concurrence of both parties (Miller v. State, 12 Wall. 159); it is for the court to determine what is "sufficient reason" for this preference under all the circumstances (Hoge v. Richmond & D. R. R. Co., 93 U. S. 1); and preference will not be given where the execution of the revenue laws of a State is enjoined, unless it appears that the operations of the State government will be embarrassed. (Hoge v. Richmond & D. R. R. Co., 93 U. S. 1.) A suit in the nature of a quo warranto to try the title to office in a private corporation is not entitled to priority. (Miller v. State, 12 Wall. 159.) So the ordinances of a municipal corporation are not entitled to priority. (Davenport City v. Dows, 15 Wall. 390.)

§ 474. **Notice of case for trial.**—In all civil actions in the courts of the United States either party may notice the same for trial. (Rev. Stats. sec. 950.)

§ 475. **Suits of United States against individuals—Credits.**—In suits brought by the United States against individuals, no claim for a credit

shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or by some unavoidable accident. (Rev. Stats. sec. 951.)

Suits brought by the United States.—This section embraces every suit between the United States and an individual (U. S. v. Ingersoll, Crabbe, 135; Fed. Cas. No. 15440; U. S. v. Barker, 1 Paine, 156; Fed. Cas. No. 14517), and no State law can effect the question of set-off on such an action. (U. S. v. Robeson, 9 Peters, 319; Reeside v. Walker, 11 How. 272; U. S. v. Eckford, 6 Wall. 484; Watkins v. U. S., 9 Wall. 759; U. S. v. Prentice, 6 McLean, 65; Fed. Cas. No. 16083.) The section applies to a suit brought against one who failed to account for money received during the war as acting regimental quartermaster (United States v. Wade, 75 Fed. Rep. 261.) The object of the act is to liquidate and adjust all accounts between the parties. (U. S. v. Wilkins, 6 Wheat. 135; U. S. v. Fillebrown, 7 Peters, 28; Gratiot v. U. S., 15 Peters, 336; U. S. v. Fitzgerald, 4 Cranch C. C. 203; Fed. Cas. No. 15107.) Judgment cannot be rendered against the United States for the excess of a setoff over the claim of the United States (Reeside v. Walker, 11 How. 272; U. S. v. Eckford, 6 Wall. 484; Schaumberg v. U. S., 35 Leg. Int. 29; Fed. Cas. No. 12442); or can the assignee of a claim use it as a set-off, although the State law may allow it as a set-off in State courts. (U. S. v. Robeson, 9 Peters, 319.) Evidence may be given of

a claim if it has been presented to the proper accounting officers, and by them disallowed. (U. S. v. Ringgold, 8 Peters, 150; U. S. v. Smith, 1 Bond, 68; Fed. Cas. No. 16321; U. S. v. Corwin, 1 Bond, 149; Fed. Cas. 14870; United States v. North American Commercial Co., 74 Fed. Rep. 145.) So of the claim of sureties on an official bond. (United States v. Giles, 9 Cranch, 212; but see Cox v. U. S., 6 Peters, 172.) So of a claim of a collector of internal revenue which has been rejected. (U. S. v. Kimball, 101 U. S. 726.) So where a claim was rejected by the secretary of the treasury. (U. S. v. MacDaniel, 7 Peters, 1.) This section applies to payments by sureties of a defaulting postmaster on account of his liability made in cash, as well as to credits, when evidence of such payments is sought to be introduced by the sureties in an action against them on the bond (Alexander v. United States, 15 U. S. App. 158; 57 Fed. Rep. 828). A defendant may give evidence that money was collected under a judgment without proof that the claim has been presented to the proper officers and rejected. (Meyers v. U. S., 1 McLean, 493; Fed. Cas. No. 9996.) So a defendant may claim credits, though not presented and disallowed until after commencement of the suit. (U. S. v. Hawkins, 10 Peters, 125.) Where a claim has not been presented and disallowed, no evidence can be given concerning it, unless defendant has vouchers which he could not procure before. (Watkins v. U. S., 9 Wall. 759; Halliburton v. U. S., 13 Wall. 63; Railroad Co. v. U. S., 101 U. S. 541; U. S. v. Austin, 2 Cliff. 325; Fed. Cas. No. 14480; U. S. v. Ingersoll, Crabbe, 135; Fed. Cas. No. 15440; U. S. v. Smith, 1 Bond, 68; Fed. Cas. No. 16321; U. S. v. Duval, Gilp, 356; Fed. Cas. No. 15015; U. S. v. Barker, 1 Paine, 156; Fed. Cas. No. 14517.) This section requires that the claim only shall have been presented, and not the evidence

to support it and hence such evidence will not be excluded merely because it was never so presented. (United States v. Patrick, 36 U. S. App. 645; 73 Fed. Rep. 800.) Proof of a claim is not admissible until a proper foundation is laid by proof of its rejection, and parol evidence is inadmissible for that purpose (U. S. v. Gilmore, 7 Wall. 491); and in default of proof of rejection the claim should be withdrawn from the consideration of the jury (U. S. v. Gilmore, 7 Wall. 491; U. S. v. Smith, 1 Bond, 68; Fed. Cas. No. 16321); but an instruction cannot be given that defendant is not entitled to credits unless there is no evidence to support them. (U. S. v. Laub, 12 Peters, 1.) No particular form of allowance or disallowance is required (U. S. v. Duval, Gilp, 356; Fed. Cas. 15015); but the suspension of a claim is not a disallowance. (U. S. v. Duval, Gilp. 356; Fed. Cas. No. 15015; U. S. v. Cadwalader, Gilp. 563; Fed. Cas. No. 14706.) A suspended claim may be allowed by the successor in office. (U. S. v. Cadwalader, Gilp. 563; Fed. Cas. No. 14706.) The bringing of an action for the balance that excludes the claim is a sufficient disallowance. (U. S. v. Duval, Gilp. 356; Fed. Cas. No. 15015.) An equitable claim that should have been allowed by an exercise of discretionary power may be admitted as a set-off. (U. S. v. MacDaniel, 7 Peters, 1; U. S. v. Ripley, 7 Peters, 18; U. S. v. Duval, Gilp. 356; Fed. Cas. No. 15015.) A credit or allowance made by the head of a department cannot afterward be recalled. (U. S. v. Bank, 15 Peters, 377; U. S. v. Kuhn, 4 Cranch C. C. 401; Fed. Cas. No. 15545.) A claim for unliquidated damages cannot be used as a set-off. (U. S. v. Robeson, 9 Peters, 319; U. S. v. Buchanan, 8 How. 83; U. S. v. Williams, 5 McLean, 133; Fed. Cas. No. 16721; U. S. v. Wells, 2 Wash. C. C. 161; Fed. Cas. No. 16663.) So a claim for a new credit from another account cannot be received unless

it has been first presented to the treasury department. (Cox v. U. S., 6 Peters, 172.) So a credit allowed to a quartermaster must first be presented at the treasury department. (U. S. v. Lent, 1 Paine, 417; Fed. Cas. No. 15593.) A charge against one claim on which there will be a balance cannot be used as a set-off against another claim. (U. S. v. Prentice, 6 McLean, 65; Fed. Cas. No. 16083.) A claim which requires legislative action is not a proper set-off. (U. S. v. MacDaniel, 7 Peters, 1; U. S. v. Buchanan, 8 How. 83; U. S. v. Williams, 5 McLean, 133; Fed. Cas. No. 16721; U. S. v. Wells, 2 Wash. C. C. 161; Fed. Cas. No. 16663.) The presentation of a claim against the United States to the treasury department for examination and allowance as required by law bars the running of the statute of limitations during the time consumed in such investigation. (Utz v. United States, 75 Fed. Rep. 648.)

§ 476. **In suits under postal laws—Credits.**—No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent, or employee of the post-office department, unless the same has been presented to the sixth auditor, and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such credit by some unavoidable accident. (Rev. Stats. sec. 952.)

Note.—If a statute does not give an allowance as a matter of right, the disallowance of the postmaster-general is conclusive; but if he is entitled to a claim

as a matter of right, he may use it as a set-off, although it be disallowed. (U. S. v. Davis, Deady, 294; Fed. Cas. No. 14927.) If a claim has not been presented to the sixth auditor, and by him disallowed, it cannot be used as a set-off, unless the party is in possession of vouchers which he could not before procure. (Ware v. U. S., 4 Wall. 617.)

§ 477. **Bill of exceptions**—A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto. (Rev. Stats. sec. 953.)

Note.—If the bill is signed by the judge it is sufficient, though not sealed. (Geueres v. Campbell, 11 Wall. 193.) It is conclusive upon the supreme court which cannot assume that any material part of the evidence is omitted. (Bingham v. Cabot, 3 Dall. 19, 382.) A bill of exceptions may be signed after the expiration of the term at which the judgment was rendered if done by consent of parties given during that term. (Waldron v. Waldron, 156 U. S. 361.)

§ 478. **Defects of form — Amendments.** — No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those

which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. (Rev. Stats. sec. 954.)

Amendments—In general.—This section authorizes amendments only in cases properly instituted and then only in matters of form. (Lusk's Admrs. v. Kimball, 87 Fed. Rep. 545. This section is remedial, and should be liberally construed (Parks v. Turner, 12 How. 39; Tobey v. Claflin, 3 Sum. 379; Fed. Cas. No. 14066; Gregg v. Gier, 4 McLean, 208; Fed. Cas. No. 5799); but amendments are not allowed with such liberality in penal actions or forfeitures as in civil actions (U. S. v. Batchelder, 9 Int. Rev. Rec. 98; Fed. Cas. No. 14541); and a criminal information cannot be amended at the trial in any manner affecting the charge. (Columbia v. Herlihy, 1 McAr. 466.) The power to amend at common law was limited to trivial errors, and could not be exercised after final judgment (Smith v. Allyn, 1 Paine, 453; Fed. Cas. 13000; Nelson v. Barker, 3 McLean, 379; Fed. Cas. No. 10101); but this section empowers generally any United States court to disregard mere defects in form in giving judgment, except those which the party demurring sets down as the cause of the demurrer (Rosenbach v. Dreyfuss, 1 Fed. Rep. 394); and authorizes the allowance of amendments during the trial. (Bamberger v. Terry, 103 U. S. 40.) It embraces every step in the cause down to the judgment. (Roach v. Hulings, 16 Pet. 319.) Where no local statute or rule of

local law is involved, the power to amend is the same in attachment suits as in other (Tilton v. Corfield, 93 U. S. 163); and amendments of mere form, not going to the merits, and not of such a character as to prejudice, will not entitle respondents to costs. (Olsen v. The Edwin Post, 6 Fed. Rep. 314.) A defect is formal when a defendant must of necessity be guilty of a breach of the law, and liable to an action if the declaration is true. (Jacob v. U. S., 1 Brock. 520; Fed. Cas. No. 7157.) This section, except the last clause, relates to defects which are mere matters of form, and the last clause embraces matters of substance. (Smith v. Allyn, 1 Paine, 453; Fed. Cas. No. 13000.) The power is confined to process and pleadings, and reaches all defects, but does not extend to the judgment. (Smith v. Allyn, 1 Paine, 453; Fed. Cas. No. 13000.) It extends to actions brought by the United States. (Jacob v. U. S., 1 Brock. 520; Fed. Cas. 7157.)

Discretion of court.—The allowance of amendments in general rests in the sound discretion of the court. (Ex parte Bradstreet, 7 Pet. 634; Wright v. Hollingsworth, 1 Pet. 165; Walden v. Craig, 9 Wheat. 576; U. S. v. Buford, 3 Pet. 12; Mathseon v. Grant, 2 How. 263; U. S. v. Batchelder, 9 Int. Rev. Rec. 98; Fed. Cas. No. 14541.) Stevens' Admrs. v. Nichols, 157 U. S. 370; Phillip Schneider B. Co. v. American Ice M. Co., 40 U. S. App. 382; 77 Fed. Rep. 138; Jefferson v. Burnhams, U. S. App. 85 Fed. Rep. 924.) And if the party is in no default they will be allowed without costs. (Lanning v. Dolph, 4 Wash. C. C. 624; Fed. Cas. No. 8073.) So where plaintiff was notified of the defect no costs will be allowed (Hockscher v. Binney, 3 Wood. & M. 333; Fed. Cas. No. 6316); but if it materially varies the line of the defense plaintiff may be required to pay all accrued costs. (Wright v. Hollingsworth, 1 Pet. 165; Corp. v. Beatty, 1 Cranch C. C. 234; Fed. Cas. No. 5344; Ferris v. Williams, 1

Cranch C. C. 281; Fed. Cas. No. 4749; Page v. Hodgson, 1 Cranch C. C. 508; Fed. Cas. No. 10853; Elliott v. Holmes, 1 McLean, 466; Fed. Cas. No. 4392; Pierce v. Strickland, 2 Story, 292; Fed. Cas. No. 11147; Fredler v. Carpenter, 2 Wood. & M. 211; Fed. Cas. No. 4759; Sanders v. Hamilton, 2 Hayw. 282; Fed. Cas. No. 12-294.) The payment of costs is not a condition precedent, unless made so by order. (Wigfield v. Dyer, 1 Cranch C. C. 403; Fed. Cas. No. 17622; Wheaton v. Love, 1 Cranch C. C. 451; Fed. Cas. No. 17485; Butts v. Chapman, 1 Cranch C. C. 570; Fed. Cas. No. 2257.) Where the defendant misled the plaintiff, leave to amend the plea will be given only on payment of costs (Anonymous, 2 Wash. C. C. 270; Fed. Cas. No. 476); so after plea of misnomer (Payen v. Hodgson, 1 Cranch C. C. 508; Fed. Cas. No. 10853); or on leave to substitute a general denial (Krouse v. Sprogell, 1 Cranch C. C. 78; Fed. Cas. No. 7940; see Milburne v. Kearnes, 1 Cranch C. C. 77; Fed. Cas. No. 9543); an amendment may be allowed with the costs of the term only (Greeley v. Smith, 3 Story, 76; Fed. Cas. No. 5747); or the party applying may be required to pay the expenses of the adverse party. (U. S. v. Batchelder, 9 Int. Rev. Rec. 98; Fed. Cas. No. 14541.) An amendment varying the amount of damages was allowed after verdict on payment of costs and consent to a new trial. (Elting v. Campbell, 5 Blatchf. 183; Fed. Cas. No. 4422.) The granting or refusing leave to plead anew is in the discretion of the court (Good v. Martin, 1 Col. 406); and pleas filed before amendment may be allowed to stand, or defendant may plead de novo (Tiernan v. Woodruff, 5 McLean, 135; Fed. Cas. No. 14027; Wright v. Hollingsworth, 1 Pet. 165; Furniss v. Ellis, 2 Brock. 14; Fed. Cas. No. 5162; Corp. v. Beatty, 1 Cranch C. C. 234; Fed. Cas. No. 5344; Bank v. Hyatt, 4 Cranch C. C. 38; Fed. Cas. No. 869); but going to trial after amendment of a

declaration without objection is a waiver of right to plead de novo. (Wright v. Hollingsworth, 1 Pet. 165.) Amendments to pleadings after two demurrers sustained are allowed in discretion, and the court will permit them on terms where the case is important, and to prevent part of plaintiff's remedy from being cut off. (Wilbur v. Abbot, 6 Fed. Rep. 817.) The court in its discretion may determine whether, on an amendment, the submission of the cause ought to be vacated. (Bamberger v. Terry, 103 U. S. 40.)

Continuance.—If a material amendment is allowed, the opposite party may have a continuance (Schnertzell v. Purcell, 1 Cranch C. C. 246; Fed. Cas. No. 12472; Corp. v. Beatty, 1 Cranch C. C. 234; Fed. Cas. No. 5344; Elliott v. Holmes, 1 McLean, 466; Fed. Cas. No. 4392; Walker v. Johnson, 2 McLean, 255; Fed. Cas. No. 17075; Wyatt v. Harden, Hemp. 17; U. S. v. Whisky, 7 Phila. 603; Fed. Cas. No. 16671); and if defendant amend his plea plaintiff may have a continuance and costs also (Semmes v. O'Neale, 1 Cranch C. C. 246; Fed. Cas. No. 12654; Marsteller v. McLean, 1 Cranch C. C. 550; Fed. Cas. No. 9138; Short v. Wilkinson, 2 Cranch C. C. 22; Fed. Cas. No. 12810; or his option between a continuance and costs (Milburne v. Kearnes, 1 Cranch C. C. 77; Fed. Cas. No. 9543); or defendant may be required to pay the costs of the term (Krouse v. Sprogell, 1 Cranch C. C. 78; Fed. Cas. No. 7940); or all costs up to the time of filing the amendment (Semmes v. O'Neale, 1 Cranch C. C. 246; Fed. Cas. No. 12654; Marsteller v. McLean, 1 Cranch C. C. 550; Fed. Cas. No. 9138; Short v. Wilkinson, 2 Cranch C. C. 22; Fed. Cas. No. 12810; Anonymous, 2 Wash. C. C. 270; Fed. Cas. No. 476.)

Process.—The power to alter process embraces the whole process of the suit until the satisfaction of the judgment (Cooke v. Avery, 147 U. S. 375). The United

States courts have plenary power to allow amendments of process (Eberly v. Moore, 24 How. 147), where there is anything to amend by (Furniss v. Ellis, 2 Brock. 14; Fed. Cas. No. 5162; Randolph v. Barrett, 16 Fed. Rep. 138; Tayloe v. Wharfield, 2 Cranch C. C. 248; Fed. Cas. No. 13772); and so of criminal process in matters of form (Anonymous, 1 Gall. 22; Fed. Cas. No. 444); but if process is ineffectual, no amendment can be made which would render it effectual. (Brown v. Pond, 5 Fed. Rep. 31.) The power granted is a power to amend a defect in process, and a power to amend a want of form in process (Dwight v. Merritt, 18 Blatchf. 305; 4 Fed. Rep. 616); as a neglect to advance a writ with the cause of action (Miller v. Gages, 4 McLean, 436; Fed. Cas. No. 9571); or a mistake of the clerk in the title in a writ. (Furniss v. Ellis, 2 Brock. 15; Fed. Cas. No. 5162); but see Albers v. Whitney, 1 Story, 310; Fed. Cas. No. 137.) A writ calling defendant by a wrong name may be amended by consent (Elliott v. Holmes, 1 McLean, 466; Fed. Cas. No. 4392); as by striking out administrator and inserting executor (Randolph v. Barrett, 16 Pet. 138); or by correcting the corporate name of plaintiff (Georgetown v. Beatty, 1 Cranch C. C. 234; Fed. Cas. No. 5344); but leave to strike out the name of the wife may be refused. (Moores v. Carter, Hemp. 64; Fed. Cas. No. 9782a.) A summons may be amended by the subsequent addition of the signature of the clerk, and seal of the court (Dwight v. Merritt, 4 Fed. Rep. 614; S. C. 18 Blatchf. 306); but a summons issued from a State court is not process within this section. (Dwight v. Merritt, 4 Fed. Rep. 614.) The court has discretion to permit an officer to amend his return with or without notice at any time (Rickards v. Ladd, 6 Saw. 40; Fed. Cas. 11804), as to both mesne and final process. (Phoenix Ins. Co. v. Walrath, 1 Fed.

Rep. 775; Semmes v. U. S., 91 U. S. 21; French v. Edwards, 5 Saw. 266; Fed. Cas. No. 5098.) But a sheriff cannot amend his return on a summons after the cause has been removed to a Federal Court (Hawkins v. Peirce, 79 Fed. Rep. 452). An execution may be made to conform to the judgment (Murphy v. Lewis, Hemp. 17; Fed. Cas. No. 18106 a); so a fieri facias may be amended by striking out the name of the deceased plaintiff (Lane v. Beltzhoover, Taney, 110; Fed. Cas. No. 8047); and longer time be given to a State than to other parties. (Rhode Island v. Massachusetts, 13 Pet. 23.) A capias may be amended by inserting the christian name of the plaintiff (Birch v. Butler, 1 Cranch C. C. 319; Fed. Cas. No. 1425); but not so as to alter the name of the plaintiff. (Comegyss v. Robb, 2 Cranch C. C. 141; Fed. Cas. No. 3049. The return to a writ of peremptory mandamus may be amended (Supervisors v. Durant, 9 Wall. 736), even after the return day (Linthicum v. Remington, 5 Cranch C. C. 546; Fed. Cas. No. 8377), or after the marshal has ceased to hold office. (Cushing v. Laird, 4 Ben. 70; Fed. Cas. No. 3508.) A court of the United States, sitting as a court of law, has an equitable power over its own process to prevent abuse, oppression, and injustice, which power may be invoked by a stranger to the litigation, as incident to the jurisdiction already vested, and without regard to his own citizenship. (Gumbel v. Pitkin, 124 U. S. 131.)

Amendment to Pleadings.—The court is authorized at any time during the trial to allow an amendment to the pleadings, and where it has done so it rests in its discretion to determine whether the submission of the case ought not to be vacated. (Bamberger v. Terry, 103 U. S. 40.) Some amendments are permitted at any stage of the proceedings (Walden v. Bodley, 14 Pet. 156; Keene v. Wheatley, 4 Phila. 157; Fed. Cas. No. 7644); so a bill may be amended after demurrer

sustained (Hunt v. Rousmaniere, 2 Mason, 342; Fed. Cas. No. 6898; Fisher v. Rutherford, Bald. 188; Fed. Cas. No. 4823); as by making new parties even after the case has been remanded from the supreme court (Russell v. Clark, 7 Cranch, 69; Caldwell v. Taggart, 4 Pet. 190); or after hearing so as to make out a new case on the same subject-matter. (Neale v. Neales, 9 Wall. 1; Battle v. Mut. L. Ins. Co., 10 Blatchf. 417; Fed. Cas. No. 1109.) But an amendment of an intervenor's claim for personal injuries setting up a distinct ground of negligence, is too late, after a master has finished a hearing and is preparing his report (Clyde v. Richmond & D. R. Co., 59 Fed. Rep. 394). The commissioner has no power to amend the complaint or warrant in an extradition case, or to supply defects by his certificate after the case is closed, and a writ of certiorari is served upon him. (Ex parte Lane, 6 Fed. Rep. 34.) Notice for leave to amend should be given to the adverse party. (Good v. Martin, 1 Col. 406.) A pleading may be amended so as to bring the case within the exception to the statute of limitations (Piatt v. Vattier, 9 Pet. 405; The Harmony, 1 Gall. 123; Fed. Cas. No. 6081; Tierman v. Woodruff, 5 McLean, 135; Fed. Cas. No. 14027); as that the fraud was not discovered until the time that would remove the bar of the statute. (Wharton v. Lowrey, 2 Dall. 364.) A plea of the statute of limitations can be amended only when shown necessary for the justice of the case. (Thompson v. Afflick, 2 Cranch C. C. 46; Fed. Cas. No. 13939.) Blanks may be filled in a declaration to avoid the statute of limitations on payment of costs. (Ferris v. Williams, 1 Cranch C. C. 281; Fed. Cas. No. 4749.) Leave to file a plea of the statute of limitations applied for out of time will be refused. (Read v. Clark, 3 McLean, 480; Fed. Cas. No. 11643.) Leave may be granted to verify pleadings as required by statute (Loving v. Fairchild,

1 McLean, 333; Fed. Cas. No. 8556); but not on the trial to the surprise of the plaintiff. (Benedict v. Maynard, 6 McLean, 21; Fed. Cas. No. 1296.)

Plaintiff's refusal to comply with an order requiring him to separately paragraph his different causes of action according to the local practice, justifies a dismissal of his case. (Thompson v. Gatlin, 19 U. S. App. 157; 58 Fed. Rep. 534.) If the court has jurisdiction at the commencement of a suit, subsequent amendments of pleadings do not affect the jurisdiction. (Tug River Coal & Salt Co. v. Brigel, U. S. App., 86 Fed. Rep. 818.) The circuit court can, in its discretion, allow amendments to the pleadings for the purpose of more fully presenting the facts at issue between the parties even after reversal by the supreme court of the decree of the circuit court sustaining plaintiff's exceptions to the answer and granting the relief prayed for. (In re Sanford Fork & Tool Co., 160 U. S. 247.)

Amendment as to parties.—A defect of parties may be cured by amendment (Douglas v. Butler, 6 Fed. Rep. 228); or by striking out parties (Connolly v. Taylor, 2 Peters, 556; Cole S. M. Co. v. Virginia G. H. W. Co., 1 Saw. 470; Fed. Cas. No. 2989); or by substituting the proper party as plaintiff (Essex Co. Nat. Bank v. Bank of Montreal, 15 Am. Law. Reg., N. S., 418; Fed. Cas. No. 4532); but it cannot be amended so as to make new parties (Morris v. Barney, 1 Cranch C. C. 245; Fed. Cas. No. 9826; Luke's Admrs. v. Kimball, 85 Fed. Rep. 545); nor so as to strike out or alter the name of one of the plaintiffs (Moores v. Carter, Hemp. 64; Fed. Cas. No. 9782a; Comegyss v. Robb, 2 Cranch C. C. 141; Fed. Cas. No. 3049); but it may be amended by inserting the names of the members of a firm (Tibbs v. Parrott, 1 Cranch C. C. 177; Fed. Cas. No. 14022); but not if the form of the action is such that the member is already embraced (United States v. Mc-

Coy, 54 Fed. Rep. 107); so an error in a name may be corrected (Furniss v. Ellis, 2 Brock. 14; Fed. Cas. No. 5162)) as in the name of a corporation. (Corp. of Georgetown v. Beatty, 1 Cranch C. C. 234; Fed. Cas. No. 5344.) An amendment will be allowed, striking out a name from a petition (Whitaker v. Pope, 2 Woods, 463; Fed. Cas. No. 17528); and on a plea of misnomer plaintiff may amend as to the name of defendant (Nelson v. Barker, 3 McLean, 379; Fed. Cas. No. 10101; Scull v. Briddle, 2 Wash. C. C. 200; Fed. Cas. No. 12570; see Craig v. Brown, Pet. C. C. 139; Fed. Cas. No. 3326); or by striking out the name of a defendant. (Greeley v. Smith, 3 Story, 76; Fed. Cas. No. 5747.) Dismissal by plaintiff of the action as against some of the defendants, not on the merits, is not a bar to a subsequent action on the cause against such defendants. (Huckill v. Marysville & B. S. R. Co., 72 Fed. Rep. 745.) Leave to dismiss as to certain defendants will not be granted after the court has rendered an opinion granting a motion to direct a verdict for defendants. (Wright v. Southern Ry. Co., 80 Fed. Rep. 260.)

Plaintiff's pleadings.—The declaration may be amended at any stage of the trial if not actually committed to the jury (Smith v. Barker, 3 Day, 312; Fed. Cas. No. 13013; Mack v. Porter, 25 U. S. App. 595; 72 Fed. Rep. 236); and a dismissal may be stricken out with leave to amend (Lanning v. Dolph, 4 Wash. C. C. 624; Fed. Cas. No. 8073); if a declaration fails to allege the matter in controversy it may be amended (Lanning v. Dolph, 4 Wash. C. C. 624; Fed. Cas. No. 8073); and the claim for damages may be increased. (Gregg v. Gier, 4 McLean, 208; Fed. Cas. No. 5799; Good v. Martin, 1 Col. 406.) A party may amend his complaint so as to demand two-thirds instead of the entire property. (Van Zandt v. Argentine Min. etc. Co., 2 McCrary, 159; 8 Fed. Rep. 725.)

The amended declaration is sufficient if it avers citizenship in the present tense (Birdsall v. Perego, 5 Blatchf. 251; Fed. Cas. No. 1435); but a complainant cannot abandon his case and make a new and different one by amendments (Sneed v. McCoull, 12 How. 407; Shields v. Barrow, 17 How. 130; Goodyear v. Bourn, 3 Blatchf. 266; Fed. Cas. No. 5561.) It will not be allowed to change from an action on the case to an action in debt (Ten Broeck v. Pendleton, 5 Cranch C. C. 464; Fed. Cas. No. 13827; Schoolfield v. Fitzhugh, 1 Cranch C. C. 108; Fed. Cas. No. 12474); but it is allowed when the cause of action is not changed (Fiedler v. Carpenter, 2 Wood. & M. 211; Fed. Cas. No. 4759); as by adding a new count of a kindred cause of action (Tiernan v. Woodruff, 5 McLean, 135; Fed. Cas. No. 14027; Bowen v. Needles Natl. Bank, 79 Fed. Rep. 49); and founded on the same transaction, and admitting the same pleading, defense, and proof. (Tiernan v. Woodruff, 5 McLean, 135; Fed. Cas. No. 14027; U. S. v. Batchelder, 9 Int. Rev. Rec. 98; Fed. Cas. No. 14541.) A declaration may be amended so as to refer to the right statute. (Rosenbach v. Dreyfuss, 1 Fed. Rep. 391.) Plaintiff may be allowed to withdraw a replication, and file a denial or plea (McGill v. Shehee, 1 Cranch C. C. 49; Fed. Cas. No. 8796); but he cannot amend his replication after the jury is sworn. (Clark v. Mayfield, 3 Cranch C. C. 353; Fed. Cas. No. 2858.) After demurrer sustained the plaintiff is not entitled as matter of right to amend his bill; it is within the discretion of the court to allow it (National Bank v. Carpenter, 101 U. S. 567); and the order denying the motion to amend is not reviewable if the record does not show what amendment was desired (National Bank v. Carpenter, 101 U. S. 567); but plaintiff may show a subsequent capacity to sue after demurrer sustained. (Swatzel v. Arnold, 1 Woolw. 383; Fed. Cas. No. 13682.) When

the nature of the suit is as not such as to give the court jurisdiction over a nonresident defendant brought in by substituted service, the court has no power to amend the pleadings so as to give such jurisdiction. (Adams v. Heckscher, 80 Fed. Rep. 742.) When a complaint is amended its legal effect is the same as though it had originally read as amended. (Bowden v. Burnham, 19 U. S. App. 448; 59 Fed. Rep. 752; Carnegie, Phipps & Co. v. Hulbert, 36 U. S. App. 81; 70 Fed. Rep. 209.)

Defendant's pleading.—A defendant may amend his plea (McGill v. Shehee, 1 Cranch C. C. 49; Fed. Cas. No. 8796), or withdraw a plea (Melburne v. Kearnes, 1 Cranch C. C. 77; Fed. Cas. No. 9543; Gill v. Patten, 1 Cranch C. C. 114; Fed. Cas. No. 5427; Short v. Wilkinson, 2 Cranch C. C. 22; Fed. Cas. No. 12810; or file an additional plea (Semmes v. O'Neale, 1 Cranch C. C. 246; Fed. Cas. No. 12654; Teasdale v. Jordan, 2 Hayw. 28; Fed. Cas. No. 13814); or add an affidavit thereto (Loving v. Fairchild, 1 McLean, 333; Fed. Cas. No. 8556); or he may withdraw his plea and demur (Deakins v. Lee, 1 Cranch C. C. 442; Fed. Cas. No. 3697; Krouse v. Sprogell, 1 Cranch C. C. 78; Fed. Cas. No. 7940); Alricks v. Slater, 1 Cranch C. C. 72; Fed. Cas. No. 259); but upon the overruling of the demurrer the court may refuse to permit him to file an answer setting up a new cause of action. (Baltimore & O. R. R. Co. v. Camp, 81 Fed. Rep. 807.) Defendant may file a plea in abatement (Eberly v. Moore, 24 How. 147); or an additional plea, and amend those already filed. (Polard v. Dwight, 4 Cranch, 421; Marine Ins. Co. v. Hodgson, 6 Cranch, 206; U. S. v. Kirkpatrick, 9 Wheat. 720; Day v. Chism, 10 Wheat. 449.) New pleas should be allowed only where a good reason is shown for it, and on terms (Childs v. Lenig, 1 Wall. Jr. 305; Fed. Cas. No. 2680); but leave to file a special plea is allowed where it does not ap-

pear clearly bad (Gillen v. Patten, 1 Cranch C. C. 114; Fed. Cas. No. 5427), and an insufficient plea will be rejected. (Kerr v. Force, 3 Cranch C. C. 8; Fed. Cas. No. 7730.) It will not be allowed if it essentially changes the ground of the defense, unless for cogent reasons (Smith v. Babcock, 2 Woods & M. 246; Fed. Cas. No. 13009; Morehead v. Jones, 3 Wall. Jr. 306; Fed. Cas. No. 9791); and where the case is called for trial only when necessary for the justice of the case (Bullock v. Van Pelt, Bald. 463; Fed. Cas. No. 2131; Bastable v. Wilson, 1 Cranch C. C. 124; Fed. Cas. No. 1097; Allen v. Magruder, 3 Cranch C. C. 6; Fed. Cas. No. 230; Childs v. Lenig, 1 Wall. Jr. 305; Fed. Cas. No. 2680); and it cannot be filed after the jury has been sworn (Lanning v. Dolph, 4 Wash. C. C. 624; Fed. Cas. No. 8073), nor if judgment on demurrer has been affirmed on appeal. (Hodgson v. Marine Ins. Co., 1 Cranch C. C. 569; Fed. Cas. No. 6566); nor permit defendant to amend his answer so as to deny a fact affirmatively passed upon and determined by the supreme court (Walker v. Brown, 86 Fed. Rep. 364). The court will permit the withdrawal of a demurrer (Suckley v. Slade, 5 Cranch C. C. 123; Fed. Cas. No. 13587); but leave to amend a demurrer which does not go to the merits will be refused (Offutt v. Beatty, 1 Cranch C. C. 213; Fed. Cas. No. 10448). The fact of not setting out special defenses cannot be cured by filing special notice of defense (Doughty v. West, 2 Fish. Pat. Cas. 553; Fed. Cas. No. 4029). An amendment to the answer will not be allowed unless good cause and the use of diligence be shown (Lamb v. Parkman, 21 Law Rep. 589; Fed. Cas. No. 8019.) An admission cannot be withdrawn if there is no allegation of mistake in fact or of law (Morehead v. Jones, 3 Wall. Jr. 306; Fed. Cas. No. 9791; Waterman v. Merrill, 2 Abb. U. S. 478; Fed. Cas. No. 17258). The amendment of an answer by the assertion of an additional fact was re-

fused, where the fact was known, at the time the answer was filed (Cross v. Morgan, 6 Fed. Rep. 241). It is not allowed where due diligence has not been exercised (Snead v. McCoull, 12 How. 407; Clifford v. Coleman, 13 Blatchf. 210, Fed. Cas. No. 2894; Ross v. Carpenter, 6 McLean, 382; Fed. Cas. No. 12072; Indiana Rubber Co. v. Phelps, 8 Blatchf. 185; Fed. Cas. No. 7025; Webster Loom Co. v. Higgins, 13 Blatchf. 349; Fed. Cas. No. 17341; Suydam v. Truesdale, 6 McLean, 459; Fed. Cas. No. 13656); but it is not necessary that the new fact should be first established (Smith v. Babcock, 2 Wood & M. 246; Fed. Cas. No. 13009).

At law.—An amendment cannot be allowed to change the form of action (Scholfield v. Fitzhugh, 1 Cranch C. C. 108; Fed. Cas. No. 12474; but see The Harmony, 1 Gall. 123; Fed. Cas. No. 6081.) A declaration in ejectment may be amended by inserting a later date of the lease. (Walden v. Craig, 9 Wheat. 576; Blackwell v. Patton, 7 Cranch, 471.) The State of the demise may be amended (Blackwell v. Patton, 7 Cranch, 471; Smith v. Vaughan, 10 Peters, 367; McDaniel v. Wailes, 4 Cranch C. C. 201; Fed. Cas. No. 8746; see Day v. Chism, 10 Wheat. 449); and it may be extended after judgment, but not except on notice. (Ledgerwood v. Pickett, 1 McLean, 143; Fed. Cas. No. 8175.) Stating it under a new title will not be allowed. (Gale v. Babcock, 4 Wash. C. C. 199; Fed. Cas. No. 5188.) If judgment in ejectment is rendered after the lapse of the terms stated in the demise, it may be amended by enlarging the term. (Walden v. Craig, 9 Wheat. 576.) In slander an amendment may be allowed changing the words charged (Dougherty v. Bentley, 1 Cranch C. C. 219; Fed. Cas. No. 4024); and in libel an answer was allowed to be amended by inserting denials in respect to the amount of damages. (Goodyear D. V. Co. v. White,

17 Blatchf. 5; Fed. Cas. No. 5601.) A libel or information at common law to enforce a forfeiture may be amended. (U. S. v. Stevenson, 6 Int. Rev. Rec. 221; Fed. Cas. No. 16398; U. S. v. Batchelder, 9 Int. Rev. Rec. 98; Fed. Cas. No. 14541; U. S. v. Barrels, 3 Int. Rev. Rec. 114; Fed. Cas. No. 16502; U. S. v. Whiskey 7 Phila. 603; Fed. Cas. No. 16671; U. S. v. Casks, 1 Abb. U. S. 573; Fed. Cas. No. 15943; Anon., 1 Gall. 22; Fed. Cas. No. 444.) So a petition on a court of claims may be amended. (Molina v. U. S., 6 Ct. of Cl. 269.) When the jury find larger damages than are laid in the declaration, and plaintiff asks to amend, defendant is entitled to a new trial and to costs. (Etting v. Campbell, 5 Blatchf. 183; Fed. Cas. No. 4422.)

In equity.—Amendments in mere matters of form, dates, or verbal inaccuracies, are liberally allowed. (Smith v. Babcock, 3 Sum. 583; Fed. Cas. No. 13008.) The court has power in the interest of justice to permit an amendment to defective pleadings, both of bills and answers. (Neale v. Neales, 9 Wall. 1; Foote v. Silsby, 1 Blatchf. 545; Fed. Cas. No. 4918; Battle v. Mut. L. Ins. Co., 10 Blatchf. 417; Fed. Cas. No. 1109; Caster v. Woods, Bald 289; Fed. Cas. No. 2505.) A bill may be amended by making new parties (Fisher v. Rutherford, Bald. 188; Fed. Cas. No. 4823); or by adding an averment of citizenship (Fisher v. Rutherford, Bald. 188; Fed. Cas. No. 4823; Keene v. Wheatley, 4 Phila. 157; Fed. Cas. No. 7644); even after interlocutory decree on demurrer (Fisher v. Rutherford, Bald. 188; Fed Cas. No. 4823; Hilliard v. Brevoort, 4 McLean, 24; Fed. Cas. No. 6505; Spofford v. Ritten, 4 McLean, 253; Fed. Cas. No. 13244); and even after remand from the supreme court (Jackson v. Ashton, 10 Pet. 480); or by striking out an invitation to other creditors to come in at any time before answer. (Yates v. Arden, 5 Cranch C. C. 526;

Fed. Cas. No. 18126.) So a bill may be amended by adding a prayer for relief. (Horsburg v. Baker, 1 Pet. 232.) It may be amended so as to conform its special prayer to its real purpose. (Partee v. Thomas, 11 Fed. Rep. 772; see Estill v. Deckard, 4 Baxt. 497.) So if the facts authorize a redemption from a creditors' sale though the period for redemption is past, the court will permit an amendment to the prayer for relief. (Burgess v. Graffam, 10 Fed. Rep. 216.) If the amendment introduces a new case, defendant may plead in abatement or otherwise. (Keene v. Wheatley, 4 Phila. 157; Fed. Cas. No. 7644.) When due diligence is shown, the bill may be amended, even though the claim is stale. (Wharton v. Lowrey, 2 Dall. 364; Fisher v. Rutherford, Bald. 188; Fed. Cas. No. 4823; Copen v. Flesher, 1 Bond, 440; Fed. Cas. No. 3211.) Where a new cause of action is intended by an amendment, it may be allowed when it corresponds with the original bill (U. S. v. Distilled Spirits, 1 Abb. U. S. 573; Fed. Cas. No. 15943); but not when it introduces a new cause of action (The Circassian, 2 Ben. 171; Fed. Cas. No. 2723; see Walden v. Bodley, 14 Pet. 156); but an amendment which changed the character of the bill was allowed in a special case, even after final decree. (The Tremolo Patent, 23 Wall. 518.) Where the original petition was lost, the court may allow the filing of a new petition. (Phillips v. Moore, 100 U. S. 208.) The amended bill should state so much of the original bill as is necessary. (Pierce v. West, 3 Wash. C. C. 354; Fed. Cas. No. 10910.) An amendment relates back to the filing of the original bill, and is incorporated into and is a part of it. (Gaylord v. Ft. W. M. & C. R. Co., 6 Biss. 286; Fed. Cas. No. 5284.) An amendment was allowed where it was clear the cause was tried as it must have been tried had the bill been originally drawn as amended. (Tremaine v. Hitch-

cock, 23 Wall. 518.) On a motion made before final argument, leave may be granted to amend an answer, so as to set up a new defense. (Snow v. Tapley, 13 Off. Gaz. 548; Fed. Cas. No. 13147.) An application to reform an answer is more favorably received than one to strike it off and substitute another. (Caste v. Wood, Bald. 289; Fed. Cas. No. 2505.) In a particular case an amendment was allowed so as to deny the validity of a patent (Morehead v. Jones, 3 Wall. Jr. 306; Fed. Cas. No. 9791); and an amendment in an answer, on the ground of mistake or error in the admission of an infringement, was denied. (Ruggles v. Eddy, 11 Blatchf. 524; Fed. Cas. No. 12118.) An amendment will not make evidence admissible which was taken under objections before admission. (Roberts v. Buck, 6 Fish. Pat. Cas. 325; Fed. Cas. No. 11897.) A motion to amend by adding new parties defendant after replication where plaintiff was in a position to make the amendment before will not be allowed. (Clifford v. Coleman, 13 Blatchf. 210; Fed. Cas. No. 2894; see Gaylord v. Fort Wayne & Co., 6 Biss. 286; Fed. Cas. No. 5284.) A bill not framed with a view to compel the receiver and back tax collector to proceed with the collection of taxes cannot be amended so as to obtain relief against such collector. (Meriwether v. Garrett, 102 U. S. 472.) An amendment to an answer cannot be made after an interlocutory decree. (Wilson v. Tuberville, 2 Cranch C. C. 27; Fed. Cas. No. 17844.) In equity the party amending may be required to pay costs. (Foote v. Silsby, 1 Blatchf. 545; Fed. Cas. No. 4918; Yates v. Arden, 5 Cranch C. C. 526; Fed. Cas. No. 18126; Davis v. Leslie, 1 Abb. Adm. 123; Fed. Cas. No. 3639.) A motion to amend by averment on information and belief that the invention was in public use more than two years, denied. (Webster Loom Co. v. Higgings, 13 Blatchf. 349, 954; Fed. Cas. No. 17341.)

In admiralty.—A libel or information to enforce a forfeiture may be amended (The Caroline, 7 Cranch, 498; The Edward, 1 Wheat. 261); or a libel in rem for violation of a municipal law (The Marianna Flora, 11 Wheat. 1; Anon., 1 Gall. 22; Fed. Cas. No. 444); and in case of smuggling, an amendment is allowed, to show that a foreign-owned vessel is liable to penalty for the infraction of duty laws. (U. S. v. The Queen, 4 Ben. 237; Fed. Cas. No. 16107.) An informal libel or information in rem may be amended by leave of court. (The Caroline, 7 Cranch, 498.) A libel in admiralty may be amended as to parties (The Commander-in-Chief, 1 Wall. 43), by striking out names of libelants (Taylor v. Harwood, Taney, 437; Fed. Cas. No. 13794); as the name of the pilot (Newell v. Norton, 3 Wall. 257); or by discharging the master (United States v. The Queen, 11 Blatchf. 416; Fed. Cas. No. 16108); but it cannot be amended by striking out the name of the sole libelant and substituting another. (The Detroit, 1 Brown Adm. 141; Fed. Cas. No. 3832.) It may be amended by striking out unnecessary and impertinent allegations (Amer. Ins. Co. v. Johnson, Blatchf. & H. 9; Fed. Cas. No. 303), or immaterial averments as to ownership (U. S. v. The Queen, 4 Ben. 237; Fed. Cas. No. 16107); or by adding new allegations (The Edward, 1 Wheat. 261), or a new cause of forfeiture (U. S. v. Whiskey, 7 Phila. 603; Fed. Cas. No. 16671); but not if barred by the statute of limitations (U. S. v. Casks, 1 Abb. U. S. 573; Fed. Cas. No. 15943; The Harmony, 1 Gall. 123; Fed. Cas. No. 6081); or averments, as of negligence (The Deer, 4 Ben. 352; Fed. Cas. No. 3737); or an averment that it is prosecuted for all interested who may come in and establish their rights. (Amer. Ins. Co. v. Johnson, Blatchf. & H. 9; Fed. Cas. No. 303.) An amendment will be allowed to enable a party to obtain a contribution out of damages due for the loss of the vessel. (The C. H. Fos-

ter, 1 Fed. Rep. 733.) A new cause of action may be introduced by amendment when it corresponds with the original bill (U. S. v. Dist. Spirits, 1 Abb. U. S. 573; Fed. Cas. No. 15943); but it cannot be amended so as to change from a libel in rem to a libel in personam (The Young America, 1 Brown Adm. 463; Fed. Cas. No. 18178), or so as to increase the amount of the claim (Agnew v. Dorman, Taney, 388; Fed. Cas. No. 100), nor to show that a party was formerly owner, and sold with a covenant to discharge all liens. (The Prindiville, 1 Brown Adm. 485; Fed. Cas. No. 11435.) It may be amended by inserting a prayer for a decree against a party liable, even after a decree in rem has been rendered. (The Zenobia, Abb. Adm. 48; Fed. Cas. No. 18208.) An amendment to an answer will be allowed, though the effect be to defeat the action and compel libelant to seek another forum. (Reppert v. Robinson, Taney, 492; Fed. Cas. No. 11703.) A supplemental libel alleging new matter, and an answer thereto, may be filed after appeal in the discretion of the court. (U. S. v. Dist. Spirits, 1 Abb. U. S. 573; Fed. Cas. No. 15943.) District courts, in the exercise of a sound discretion, may allow libels to be amended, even at the hearing (Davis v. Leslie, Abb. Adm. 123; Fed. Cas. No. 3639; The William Penn, 3 Wash. C. C. 484; Fed. Cas. No. 3373); or at any stage of the proceedings (The Hunter, 1 Ware, 249; Fed. Cas. No. 6904; Pettingill v. Dinsmore, 2 Ware, 212; Fed. Cas. 11045; Nevitt v. Clarke, Olcott, 316; The Deer, 4 Ben. 352; Fed. Cas. No. 3737; The St. John, 7 Blatchf. 220; Fed. Cas. No. 12224), till the termination of the cause (The Edwin Post, 6 Fed. Rep. 206), in the interest of substantial justice. (Pettingill v. Dinsmore, 2 Ware, 212; Fed. Cas. No. 11045; Anon, 1 Gall. 22; Fed. Cas. No. 444.) It may be amended in the circuit court (The Sarah Ann, 2 Sum. 206; Fed. Cas. No. 12342. The Morton, 1 Brown Adm.

137; Fed. Cas. No. 9864); and a defect in the signature will not be regarded if it appears it was verified (Hardy v. Moore, 4 Fed. Rep. 843); it may be allowed without waiting for the disposition of the exceptions thereto. (The Western Metropolis, 28 How. Pr. 283.) A supplemental libel and an answer thereto may be filed after appeal. (The Boston, 1 Sum. 328; Fed. Cas. No. 1673; Lamb v. Parkman, 21 Law Rep. 589.) So in collision cases (The Pennsylvania, 12 Blatchf. 67; Fed. Cas. No. 10951), and after reversal where there is a want of a substantial averment (The Anne v. U. S., 7 Cranch, 570); or even after the case has been remanded from the supreme court (The Caroline v. U. S., 7 Cranch, 496; The Anne, 7 Cranch, 570; The Mary Ann, 8 Wheat. 380); but an amendment in an admiralty case before the court of appeals cannot introduce a new subject of controversy. (Houseman v. The North Carolina, 15 Peters, 40.)

Amendment on removal.—This section, both in letter and spirit, confers the power and makes it the duty of courts to cure defects in the record by enlarging the time for filing a transcript on the removal of a cause from a State court. (Woolridge v. McKenna, 8 Fed. Rep. 663.) So an amended transcript may be filed disclosing the requisite citizenship. (Kaeizer v. Illinois Cent. R. R. Co., 6 Fed. Rep. 1; 2 McCrary, 187.) So the declaration may be amended by inserting new counts for the same cause of action. (West v. Smith, 101 U. S. 263.) A sheriff may not amend his return of service of process in a suit begun in the State court, after removal (Hawkins v. Peirce, 79 Fed. Rep. 452).

Amendment of verdict.—The words "or course of proceeding whatever" are broad enough to include verdicts (Parks v. Turner, 12 How. 39); so if a verdict is general, it may be amended so as to apply to

the count under which the evidence is given. (Matheson v. Grant, 2 How. 263; Stockton v. Bishop, 4 How. 155.) Leave may be granted to amend a verdict in replevin after the jury had returned and another cause had been tried. (Argueles v. Wood, 2 Cranch C. C. 579; Fed. Cas. No. 520.) A verdict in assumpsit "that defendant is guilty in manner and form as alleged" is amendable. (Lincoln v. Iron Co., 103 U. S. 412.) On a stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal, and deliver it to the officer in charge and disperse, the entry of the verdict in proper form is allowed by this section. (Koon v. Ins. Co., 104 U. S. 106; S. C., 3 Morr. Trans. 125.) The court may enter the verdict in such form as to give legal effect to what the jury unmistakably found, under Rev. Stat., sec. 954, and the Practice Act of Illinois. (Koon v. Phoenix Mut. L. Ins. Co., 104 U. S. 106. The verdict may be amended to correct a mistake, in the nature of a clerical error, in announcing or making the record of the verdict actually agreed upon (Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co., 71 Fed. Rep. 826); and in a proceeding in equity to remedy a mistake in announcing the verdict of a jury the jurors are competent witnesses to prove that the verdict read out in the court by their foreman was not their verdict, but the result of an oversight by him in making the announcement (Hamburg-Bremen Fire Ins. Co. v. Pelzer Mfg. Co., 42 U. S. App. 123; 76 Fed. Rep. 479).

Amendments after verdict.—A defective pleading may be cured after verdict (Garland v. Davis, 4 How. 131; Clark v. Sohier, 1 Wood & M. 368; Fed. Cas. No. 2835); and the rule that a defective statement of a good cause of action is cured by the verdict extends to penal actions (Smith v. U. S., 1 Gall. 261; Fed. Cas. No. 13122.) All circumstances necessary in form or

in substance to make out a cause of action, though imperfectly stated, must be proved at the trial; hence the defect is cured by the verdict (Pearson v. Bank, 1 Peters, 89; Matheson v. Grant, 2 How. 263; Stockton v. Bishop, 4 How. 155; De Sobry v. Nicholson, 3 Wall. 420; Corcoran v. Dougherty, 4 Cranch C. C. 205; Fed. Cas. No. 3227; Scull v. Higgins, Hemp. 90; Fed. Cas. No. 12570 a; Stanley v. Whipple, 2 McLean, 35; Fed. Cas. No. 13286; Kemble v. Lull, 3 McLean, 272; Fed. Cas. No. 7683; Gray v. James, Peters C. C. 476; Fed. Cas. No. 5719; Dobson v. Campbell, 1 Sum. 319; Fed. Cas. No. 3945); as an allegation under a videlicet (Ingle v. Collard, 1 Cranch C. C. 152; Fed. Cas. No. 7043; Woodward v. Brown, 13 Peters, 1); or the omission to join a party as plaintiff who ought to have been joined (Greenleaf v. Schell, 6 Blatchf. 225; Fed. Cas. No. 5782); or to give the time when the injury was done (Stockton v. Bishop, 4 How. 155); or to aver the value of the foreign money in an action on a bill of exchange (Brown v. Barry, 3 Dall. 365), as a declaration in debt is in the debet as well as the detinet (Brown v. Barry, 3 Dall. 208; Gardiner v. Lindo, 1 Cranch C. C. 78; Fed. Cas. No. 5231); but if it omits to show matters essential to the jurisdiction (Smith v. Allyn, 1 Paine, 486; Fed. Cas. No. 13065), or to state a cause of action, it is not cured by the verdict (Smith v. Allyn, 1 Paine, 486; Fed. Cas. No. 13065; Renner v. Bank, 9 Wheat. 581; McDonald v. Hobson, 7 How. 745; Washington v. Ogden, 1 Black. 450); or if a libel in rem does not show the commission of an offense. (See The Virgin, Peters C. C. 7; Fed. Cas. No. 16625.) An alternative allegation in an action of debt for a penalty can only be objected to by a demurrer, and is cured by a verdict. (Jacobi v. U. S., 1 Brock. 520; Fed. Cas. No. 7157.) An objection that the declaration does not make profert of letters of administration cannot be taken after verdict.

(Gardner v. Lindo, 1 Cranch C. C. 78; Fed. Cas. No. 5231; Mathéson v. Grant, 2 How. 263.) If a declaration merely assigns the nonpayment of the penal sum on a bond, an omission to assign a special breach of the condition, in a replication to a plea of performance, is cured by a verdict. (Minor v. Mechanics' Bank, 1 Peters, 46.) A verdict will cure a discontinuance caused by the failure of the executor to appear within the proper time after suggestion of the death of the plaintiff. (Brent v. Coyle, 2 Cranch C. C. 287; Fed. Cas. No. 1837.) An allegation under a videlicet may be disregarded. If the breach alleged is not a breach of the covenant, error is not cured by verdict. (Ingle v. Collard, 1 Cranch C. C. 152; Fed. Cas. No. 7043.) A plea of non assumpsit, in an action on the case, is not cured by a verdict. (Garland v. Davis, 4 How. 131.) Where two pleas present substantially the same issue, the fact that an immaterial issue is joined on the replication to one plea is no reason for arresting a judgment and awarding a repleader (Erskine v. Hornbach, 14 Wall. 613; Pegram v. U. S., 1 Brock. 261; Fed. Cas. No. 10906); so if plaintiff replies to only one. (Laber v. Cooper, 7 Wall. 565.) Although a decision sustaining a demurrer to a plea is erroneous, yet if the defense can be presented under another plea filed, the judgment will be good. (Junction R. Co. v. Bank, 12 Wall. 226.) Where there is a defect in a pleading, yet if the issue be such as required proof of the facts so defectively stated or omitted, and without which it is not to be presumed the judge would have directed a verdict, such defect is cured. (Lincoln Township v. Cambria Iron Co., 103 U. S. 415.) A variance between the writ and the declaration as to the return day is amenable. (Wilder v. McCormick, 2 Blatchf. 31; Fed. Cas. No. 17650.)

Judgments and decrees.—Judgments may be corrected after the end of the term: 1. Where the neces-

sity for correction and the matter from which it is to be made appear upon the face of the record; 2. Where justice requires a correction to be made from matters resting in the recollection of the judge or in the evidence aliunde. In the former case notice is unnecessary; in the latter case it is necessary if it rests on evidence aliunde. (O'Dell v. Reynolds, 37 U. S. App. 447; 70 Fed. Rep. 656.) All judgments, decrees, or orders are under control of the court which pronounces them during the term at which they are rendered, and may be set aside, vacated or modified. (Bronson v. Schulten, 104 U. S. 410; Aetna L. Ins. Co. v. Board of Commrs., 79 Fed. Rep. 575); as an order allowing an appeal when the appeal has not been perfected. (Aspen Mining & S. Co. v. Billings, 150 U. S. 31.) But amendments to judgments or decrees cannot be made except as to formal defects (Albers v. Whitney, 1 Story, 310; Fed. Cas. No. 137), where the entry was erroneously made (U. S. v. Bennett, Hoff. 281; Fed. Cas. No. 14573), or where there is a verbal mistake of the clerk in using a superfluity of words in entering judgment (Shaw v. Railroad Co., 101 U. S. 557; Barnes v. Lee, 1 Cranch C. C. 471; Fed. Cas. No. 1018); or where by a misprision of the clerk the judgment had not been entered according to the declaration (Woodward v. Brown, 13 Peters, 1), or where the clerk had omitted to enter judgment allowing interest (Bank v. Wistar, 3 Peters, 431); or if a judgment by confession is entered without declaration or rule to plead (Ault v. Elliot, 2 Cranch C. C. 372; Fed. Cas. No. 655); or if made by only one of several joint defendants (Hyler v. Hyatt, 2 Cranch C. C. 633; Fed. Cas. No. 6976; Newton v. Weaver, 2 Cranch C. C. 685; Fed. Cas. No. 10193; see Ringgold v. Elliot, 2 Cranch C. C. 462; Fed. Cas. No. 11844); or if entered in a wrong case (Pierce v. Turner, 1 Cranch C. C. 433; Fed. Cas. No. 11148); or if made by an attorney by mistake. (Bank

v. McKinney, 3 Cranch C. C. 173; Fed. Cas. No. 926.) A judgment may be amended by striking out a part which the court has no authority to make (The Hiram Wood, 6 Chic. L. N. 135); or where it was entered by mistake (U. S. v. Fearson, 5 Cranch C. C. 95; Fed. Cas. No. 15081); any clerical error may be corrected after the lapse of the term (Scott v. Blaine, Bald. 287; Fed. Cas. No. 12525; Brush v. Robbins, 3 McLean, 486; Fed. Cas. No. 2059); as by making it payable in gold or silver coin (Cheang Kee v. U. S., 3 Wall. 320). A judgment or decree cannot be stricken out for error of law after the lapse of the term at which it is rendered (Brush v. Robbins, 3 McLean, 486; Fed. Cas. No. 2059; Wood v. Luse, 4 McLean, 254; Fed. Cas. No. 17950; Scott v. Blaine, Bald. 287; Fed. Cas. No. 12525; Doe v. Waterloo Min. Co., 60 Fed. Rep. 643; Austin v. Riley, 55 Fed. Rep. 833; Klever v. Sewell, 22 U. S. App. 458; 65 Fed. Rep. 373; Craven v. Canadian Pac. Ry. Co., 62 Fed. Rep. 170); but if the judge has been induced to enter a decree by false representation as to its character, and which he did not intend to enter, the decree may be set aside after the term. (U. S. v. Williams, 32 U. S. App. 126; 67 Fed. Rep. 384; Fisher v. Simon, 32 U. S. App. 132; 67 Fed. Rep. 387.) But if irregularly entered it may be set aside (Union Bank v. Crittenden, 2 Cranch C. C. 228; Fed. Cas. No. 14354); as where a judgment was entered in vacation the court properly vacated it at the next term and entered a new judgment to the same effect (Abraham v. Levy, 30 U. S. App. 713; 72 Fed. Rep. 124); or for a mistake in the assessment of damages (Crooks v. Maxwell, 6 Blatchf. 468; Fed. Cas. No. 3415); or if considered as a nullity. (Wood v. Luse, 4 McLean, 254; Fed. Cas. No. 17950; Harris v. Hardeman, 14 How. 334.) Though the court cannot change the essential parts of a decree after the term at which it is entered, yet

it may subsequently amend the decree as to the mode of execution, manner of sale, time of publication, and distribution of proceeds (Turner v. I. B. & W. R. Co., 8 Biss. 380; Fed. Cas. No. 14259); but an interlocutory decree is always open to amendment and correction. (De Flovez v. Reynolds, 8 Fed. Rep. 434; 17 Blatchf. 436.) The rule that a cause may not be reheard after the term in which it was originally decided does not affect a proceeding in another cause to review the original suit. (Jackson v. Munks, 58 Fed. Rep. 596.) Where an order has been entered that the bill be taken pro confesso, defendant, even if he has entered an appearance, is not entitled to notice of subsequent application for final decree, when such application is made in open court. (Austin v. Riley, 55 Fed. Rep. 833.) The power of amendment after term does not extend to the correction of judicial errors. (Elder v. Richmond G. & S. M. Co., 19 U. S. App. 118; 58 Fed. Rep. 536.)

On error or appeal.—An amendment may be made in the appellate tribunal by agreement of parties (Fletcher v. Peck, 6 Cranch, 137; Matheson v. Grant, 2 How. 263; Anonymous, 1 Gall. 25; Fed. Cas. No. 444; Kennedy v. Bank, 8 How. 586); but not so as to introduce a new controversy. (The North Carolina, 15 Peters, 50; The John Jay, 3 Blatchf. 68; Fed. Cas. No. 7352.) So if the record does not contain the proper allegation of citizenship it may be amended. (Kennedy v. Bank, 8 How. 607.) On reversing a judgment the appellate court will not direct the lower court to allow the proceedings to be amended (Sheehy v. Mandeville, 6 Cranch, 267, note); so as to the allowance of a repleader; but it may remand the cause that the pleading may be amended. (Garland v. Davis, 4 How. 53.) The power over mere matters of form extends to the appellate court, where the defects are not to be

regarded as matters of error (Smith v. Allyn, 1 Paine, 456; Fed. Cas. No. 13064); such defects being disregarded (Stockton v. Bishop, 4 How. 155); so of an immaterial allegation under a videlicet (Steinham v. U. S., 2 Paine, 168; Fed. Cas. No. 13355; U. S. v. Burnham, 1 Mason, 57); or where there is a formal submission (Bank v. Guttschlick, 14 Peters, 19); or a defective name (Chittenden v. Davis, Hemp. 96; Fed. Cas. No. 3393 b; Conrad v. Griffey, 11 How. 480); or a variance between averments and findings (Railroad Co. v. Lindsay, 4 Wall. 650); or an error on trying issues out of their order (Townsend v. Jemison, 7 How. 706; Morsell v. Hall, 13 How. 212; or a formal defect in the verdict if it is otherwise sufficient to sustain the judgment (Downey v. Hicks, 14 How. 240); or a general verdict on distinct issues (Roach v. Hulings, 16 Peters, 319); or where the verdict and judgment are only on one demise out of several. (Van Ness v. Bank, 13 Peters, 17.) So if a declaration contains a special count, and the common counts, judgment may be sustained on the common counts (Bank v. Moss, 6 How. 31); or where there is an omission to join issue on one out of two avowals in replevin (Dermott v. Wallach, 1 Black, 96); or where there is an omission of a similiter (Dermott v. Wallach, 1 Black, 90); or the omission to obtain leave to file an amended bill, or to file a replication. (Clements v. Moore, 6 Wall. 299.) An omission on an appeal does not require the dismissal of the appeal, but the court may aid the appeal on terms. (Dayton v. Lash, 94 U. S. 112; see Vansant v. Gas Light Co., 99 U. S. 213.) A party will be allowed to enter his remittitur in the supreme court in furtherance of justice, where it appears that one of the bills sued on had been omitted to be described in the original declaration. The appellate court may correct an error in striking out defendant's pleading which con-

stitutes a ground of defense (Hozey v. Buchanan, 16 Peters, 215); or may permit the addition of counts under the statute in an action for a forfeiture (U. S. v. Whiskey, 11 Int. Rev. Rec. 109; Fed. Cas. No. 16671); or allow amendments so as to let in new evidence or grounds of defense in the circuit court in an admiralty case. (Reppert v. Robinson, Taney, 492; Fed. Cas. No. 11703.) The appellate court may allow an amendment, although it concludes against the form of the statute in an offense created by a single statute. (Kenricks v. U. S., 1 Gall. 268; Fed. Cas. No. 7713.) After a writ of error the court will not grant leave to amend in a matter of substance. (The Philadelphian, 21 U. S. App. 90; 60 Fed. Rep. 423; Marsteller v. McClean, 2 Cranch C. C. 8; Fed. Cas. No. 9140.) If a declaration in debt for a penalty does not conclude against the form of the statute, it is bad on writ of error. (Smith v. U. S., 1 Gall. 261; Fed. Cas. No. 13122.) The court will not set aside at a subsequent term the order of dismissal, and grant leave to file the record and docket the case. (Selma & Mer. R. R. Co. v. Louisiana Nat. Bank, 94 U. S. 253.) So the court denied the allowance of an amendment making a new party where the question made by the assignment of error had been settled by repeated decisions. (Pearson v. Yawdell, 95 U. S. 294.) The court refuses to consider an amended bill which does not appear to have been filed by leave of court. (Terry v. McLure, 103 U. S. 442; Godfrey v. Terry, 97 U. S. 171.) If a party omitted to file a replication in a special plea, he may be allowed to file it nunc pro tunc, although the case is on appeal. (Wilcox v. U. S., 6 Ct. of Cl. 78.)

Amendment of record.—The courts may by nunc pro tunc orders supply omissions in the record of what was actually done, but which was not entered

on the record, by reason of mistake or neglect; but they cannot thereby modify orders previously made, or make an order which they intended to make at a previous time, but did not in fact make, so as to bind the parties as of the date to which the order relates; and especially is this so in matters relating to criminal proceedings. (Ex parte Buskirk, 25 U. S. App. 613; 72 Fed. Rep. 14.) A clerical error in any part of the record may be amended. (Doane v. Glenn, 1 Colo. 454; Fidelity Ins. Co. v. Roanoke Iron Co., 84 Fed. Rep. 744; Cobb v. Howard, 10 N. Y. Leg. Obs. 353; Fed. Cas. No. 2925), even after lapse of the term (Doane v. Glenn, 1 Colo. 454); as a mistake in entering verdict on the merits (Tomes v. Redfield, 7 Blatchf. 139; Fed. Cas. No. 14085); or on entering judgment (Cromwell v. Bank, 2 Wall. Jr. 570; Fed. Cas. No. 3409; Coelle v. Lockhead, Hemp. 194; Fed. Cas. No. 2943 a); or the omission to enter an order (U. S. v. Smith, 1 Cranch C. C. 127; Fed. Cas. No. 16324), as for a mandamus (Supervisors v. Durant, 9 Wall. 736), or the allowance of time to file exceptions. (Doane v. Glenn, 1 Colo. 454.) A mistake in an entry or a misprision may be stricken out at a subsequent term (Sheppard v. Wilson, 6 How. 260); but a mistake in the docket that the judgment is for the use of another cannot be stricken out after lapse of the term. (Bradley v. Eliot, 5 Cranch C. C. 293; Fed. Cas. No. 1778.) A mistake in the name of defendant in a commission may be amended (Boone v. Janney, 2 Cranch C. C. 312; Fed. Cas. No. 1642); but a mistake in the name of the plaintiff cannot be amended where the record shows matter by which it can be amended. (Albers v. Whitney, 1 Story, 310; Fed. Cas. No. 137.) A wrong title inserted on a commission may be amended (Keene v. Meade, 3 Peters, 1); or a defect in an affidavit to an account filed with the declaration. (Tilley v. Tharp, 3 Cranch C. C. 290; Fed. Cas. No. 14047. If

important to give consistency to the minutes and render the ultimate action of the court correct, amendments may be allowed. (Amer. Ins. etc. Co. v. Johnson, Blatchf. & H. 9; Fed. Cas. No. 303; The Martha, 1 Blatchf. & H. 151; Fed. Cas. No. 9144; Nevitt v. Clarke, Olcott. 316; Fed. Cas. No. 10138.) A material amendment of the record cannot be made after writ of error brought. (U. S. v. Hooe, 1 Cranch C. C. 116; Fed. Cas. No. 15386; Michigan Ins. Bank v. Eldred, 143 U. S. 293.) A writ of error is amendable (Course v. Stead, 4 Dall. 22) by filing a blank left for the return day. (Mossman v. Higginson, 4 Dall. 12.) So a clerical mistake may be amended by the citation. (McVeigh v. U. S., 8 Wall. 640.) A bill of exceptions may be amended during the term. (Walton v. U. S., 9 Wheat. 651.)

§ 479. **Death of parties.**—When either of the parties, whether plaintiff, petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily

made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court. (Rev. Stats. sec. 955.)

§ 480. **Revivor on death of party.**—That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the supreme court, as provided in case of the death of a party after appeal taken or writ of error brought. (18 U. S. Stats. 473; 1 Sup. Rev. Stats. 177.)

Revivor on death of party.—The common-law rule that qui tam actions on penal statutes do not survive prevails in the Federal courts as to actions on penal statutes of the United States, even in States where the statutes of the State allow suits on State penal statutes after the death of the offender. (Schreiber v. Sharpless, 110 U. S. 76.) The survivability of a right of action is governed by the local law. (Warren v.

Furstenheim, 35 Fed. Rep. 691.) In case of injuries causing death a right of action survives. (Rev. Stats., secs. 5225, 5226; St. Louis etc. R. Co. v. McBride, 141 U. S. 127.)

Revival of suit.—This section saves every action from abatement by death of the parties where the cause of action survives, and the survival of the cause must depend on the local law. (Trigg v. Conway, Hemp. 711; Fed. Cas. No. 14173; Hatfield v. Bushnell, 1 Blatchf. 393; Fed. Cas. No. 6211.) It is confined to personal actions, as the power to prosecute or defend is not given to the heir or devisee; so a real action abates by death, and cannot be revived against the heir. (Green v. Watkins, 6 Wheat. 260; Macker v. Thomas, 7 Wheat. 530.) The revivor of the suit by or against the representative of deceased is a matter of right, and is a mere continuation of the original suit, without distinction as to citizenship of such representative (Clarke v. Mathewson, 12 Pet. 164); but this section does not relate to or affect suits in admiralty. (The James A. Wright, 10 Blatchf. 160; Fed. Cas. No. 7191; but see The Norway, 1 Ben. 493; Fed. Cas. No. 10357.) The mode of continuing a suit in the name of the executor or administrator is a substitute for the continuance by Journey's account. (Richards v. Md. Ins. Co., 8 Cranch, 84.) If complainant died before entry of decree from which an appeal was taken, it is no ground for abating the suit after return of the mandate. (Story v. Livingston, 13 Pet. 359.) In all cases of the death of a party before final judgment the proceedings are to be exactly as if the executor or administrator were a voluntary party to the suit. (Hatch v. Eustis, 1 Gall. 160; Fed. Cas. No. 6207.) He may be made a party on his own motion without issuing a scire facias (Wilson v. Codman, 3 Cranch, 193; Griswold v. Hill, 1 Paine, 483; Fed. Cas. No. 5834); but he must show that he is executor, and produce his

letters testamentary if required by the adverse party. (Wilson v. Codman, 3 Cranch, 193.) If he voluntarily makes himself a party, the adverse party is not entitled to a continuance. (Wilson v. Codman, 3 Cranch, 193; Griswold v. Hill, 1 Paine, 483; Fed. Cas. No. 5834.) The appearance of the heir under the rule to show cause why a real action should not be revived against him will not cure the error of such revivor. (Macker v. Thomas, 7 Wheat. 530.) Upon a bill to revive, the sole questions are as to the competency of the parties and the correctness of the frame of the bill. (Bettes v. Dana, 2 Sum. 383; Fed. Cas. No. 1368.) It cannot be brought against an administrator of a defendant who neither appeared nor was served with process (U. S. v. Fields, 4 Blatchf. 326; Fed. Cas. No. 15089), nor against one in a State other than that from which their authority proceeds. (Mellus v. Thompson, 1 Cliff. 125; Fed. Cas. No. 9405.) The abatement of a scire facias in the name of a feme sole as administratrix who afterward marries is no bar to a scire facias in the name of husband and wife. (McCoul v. Lekamp, 2 Wheat. 111.) A general denial of each allegation of a writ is a form of defense not permitted in scire facias to revive a judgment (Wonderly v. Lafayette County, 77 Fed. Rep. 665.) The proper method of reviving a suit in equity to recover real estate, which suit has abated because of death of a party plaintiff, is by a supplemental bill (Currell v. Villars, 72 Fed. Rep. 330.) The fact that one is suing in a State court upon a judgment of a Federal court will not prevent him from proceeding at the same time in the Federal court to revive the judgment by scire facias. (Wonderly v. Lafayette County, 77 Fed. Rep. 665.) A proceeding to revive a judgment being a collateral proceeding, no error in such judgment is available against it if the court which rendered it was duly organized and had jurisdiction of the subject

matter and of the parties. (Foster v. Crawford, 80 Fed. Rep. 991.)

§ 481. **When one of several plaintiffs or defendants dies.**—If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant. (Rev. Stats. sec. 956.)

§ 482. **Delinquents for public money.**—When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the treasury, and rejected, specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such con-

tinuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided. (Rev. Stats. sec. 957.)

Note.—See U. S. v. Hawkins, 10 Pet. 125. An officer against whom summary proceedings are instituted may set off the fees for services to government rendered by him. (U. S. v. Mann, 2 Brock. 9; Fed. Cas. No. 15716.)

§ 483. **Judgment for suits under postal laws.**—In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the postoffice department, which has been submitted to and disallowed by the sixth auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term. (Rev. Stats. sec. 958.)

§ 484. **Judgment for suits on debentures.**—In all suits for the recovery of money upon deben-

tures issued by the collectors of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted. (Rev. Stats. sec. 959.)

§ 485. **Judgments in suits on bonds for recovery of duties.**—When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice. (Rev. Stats. sec. 960.)

Note.—Where there is a real defense, an opportunity to obtain evidence by a continuance must be given. (U. S. v. Phelps, 8 Peters, 700.)

§ 486. **Judgment for sum due in equity on bonds, etc.**—In all suits brought to recover the forfeiture annexed to any articles of agreement,

covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury. (Rev. Stats. sec. 961.)

Note.—This section is confined to cases of default, confession and demurrer (Farrar v. U. S., 5 Peters, 373), and does not apply to cases heard on agreed facts. (Ives v. The Merchants' Bank, 12 How. 159.) Where damages exceed the penalty of the bonds, judgment should be for the penalty only. (Farrar v. U. S., 5 Peters, 373.)

§ 487. **Judgment for duties, etc.**—In all suits by the United States for the recovery of duties upon imports, or of penalties for the nonpayment thereof, the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon and costs, shall be payable in the coin by law receivable for duties; and the execution issued thereon shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution. [See sec. 3014.] (Rev. Stats. sec. 962.)

§ 488. **Interest on bonds for duties.**—Upon all bonds on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of six per centum a year, from the time when said balance became due. (Rev. Stats. sec. 963.)

§ 489. **Interest on balances due postoffice department.**—In all suits for balances due to the postoffice department, interest thereon shall be recovered from the time of the default at the rate of six per centum a year. (Rev. Stats. sec. 964.)

§ 490. **Interest on debentures.**—In suits upon debentures, issued by the collectors of the customs under any act for the collection of duties, interest shall be allowed, at the rate of six per centum per annum, from the time when such debenture became due and payable. (Rev. Stats. sec. 965.)

§ 491. **Interest on judgments.**—Interest shall be allowed on all judgments in civil causes recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State. (Rev. Stats. sec. 966.)

Interest.—This section does not embrace cases in equity nor judgments or decrees of the supreme court. Perkins v. Fourniquet, 14 How. 328.) It does not ap-

ply to judgments against the United States. (U. S. v. Sherman, 98 U. S. 565.) The interest on decrees is the same as that in the State courts. (Railroad Co. v. Turrill, 101 U. S. 836.) A judgment bears interest by force of law, although it may not purport to carry interest. (Perkins v. Fourniquet, 14 How. 328.) The liability of defendant is not only for the amount of the judgment, but for interest on it. (White v. Arthur, 10 Fed. Rep. 83; 20 Blatchf. 237.) This section does not exclude the idea of a power in the State to allow interest on verdicts; it is a right of which the successful plaintiff cannot be deprived by removal of his case to a Federal court. (Massachusetts Ben. Assn. v. Miles, 137 U. S. 689.) Where judgment was entered generally for no definite sum, and the amount actually with interest exceeded five thousand dollars, this court has jurisdiction. (Massachusetts Ben. Assn. v. Miles, 137 U. S. 689.)

§ 492. **Judgments—Lien and record of.**—That judgments and decrees rendered in a circuit or district court of the United States within any State shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State; *provided,* that whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever, and only whenever, the laws of such State shall authorize the judgments and de-

crees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State. (25 U. S. Stats. 357, sec. 1.)

§ 493. **Record in Louisiana.**—Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or the same parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish. (25 U. S. Stats. 357, sec. 3; as amended 28 U. S. Stats. 813.)

§ 494. **Effect of judgments in California.**—The passage of this act, to "Create the United States judicial district of Southern California," shall not have the effect to destroy or impair the lien of any judgment or decree rendered in the circuit or district court of the United States for the present district of California prior to this act taking effect; and final process on any judgment or decree entered in the circuit or district court of the United States for the district of California, or which shall be entered therein prior to this act taking effect, and all other process for the enforcement of any order of said courts, respectively, in

any cause or proceeding now pending therein except on proceedings removed as herein provided, shall be issued and made returnable to the proper court for the said northern district of California, and may be directed to and executed by the marshal of the United States for the said northern district in any part of the State of California. (24 U. S. Stats. 308.)

§ 495. **Judgments—Limitations.**—Judgments and decrees rendered in a circuit or district court within any State shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon. (Rev. Stats. sec. 967.)

Judgment liens.—A State law which provides that a judgment shall not be a lien unless execution be issued thereon within a certain time applies to Federal courts (Sellers v. Corwin, 5 Ohio, 398); but a State law which allows a suspension of the lien on giving security on appeal (Myers v. Tyson, 13 Blatchf. 242; Fed. Cas. No. 9995), or which provides that a judgment shall not be a lien except it be docketed in the county where the land lies, does not apply to the Federal courts. (U. S. v. Humphreys, 3 Hughes, 201; Fed. Cas. No. 15422.) The same proceedings which in a State court creates a lien in the county where judgment is entered creates it in the circuit court to the extent of its jurisdiction. (Massingill v. Downs, 7 How. 760.) The pendency of a writ of error does not affect the duration of the lien. (Chouteau v. Nuckolls, 20 Mo. 442.) The duration of a judgment lien in a Federal court is the same as that of judgments in a State court. (Chouteau v. Nuck-

olls, 20 Mo. 442.) Although land is sold under judgment of a State court, if the lien of judgments of the Federal court is allowed to expire before the sales, the first purchaser obtains the elder legal title. (Chouteau v. Nuckolls, 20 Mo. 442.) A state law cannot have a retrospective effect, so as to impair a judgment lien of the Federal court. (Massingill v. Downs, 7 How. 760; contra, Tarpley v. Hamer, 9 Smedes & M. 310.) As to district courts, "decrees" in this section apply to decrees in admiralty for the payment of money. (Ward v. Chamberlain, 2 Black. 430.) Sale of property under execution exhausts the lien of the judgment as to subsequent mortgage; and redemption by the subsequent lienholder does not restore the lien of the judgment. (Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267.) The Indiana statute authorizes redemption of railroad property from sale under execution. (Id.) Suits in equity in the Federal Courts are not deemed to be brought or commenced until the suing out of appropriate process and a bona fide attempt to serve it (United States v. American Lumber Co., 80 Fed. Rep. 309). A right of action under the act of March 3, 1887, against the government under a contract of carriage of imported goods in its custody accrues as soon as the money becomes due without a prior presentation of the claim to the executive department for allowance (United States v. Utz, 39 U. S. App. 630; 80 Fed. Rep. 848).

§ 496. **Recovery of costs.**—When, in a circuit court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the

amount in dispute, exclusive of costs, exceeds said sum or value, or a libelant, upon his own appeal, recovers less than the sum or value of three hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs. (Rev. Stats. sec. 968.)

Costs.—This section applies to cases arising under the constitution and laws of the United States as well as cases at common law. (Kneass v. Schuylkill Bank, 4 Wash. C. C. 106; Fed. Cas. No. 7876.) If a plaintiff recover less than five hundred dollars, he cannot recover costs (Kneass v. Schuylkill Bank, 4 Wash. C. C. 106; Fed. Cas. No. 7876; Leeds v. Cameron, 3 Sum. 488; Fed. Cas. No. 8206; Curranee v. McQueen, 2 Paine, 109; Fed. Cas. 3488); so if the value of land recovered is less than five hundred dollars (Green v. Liter, 8 Cranch, 229); but otherwise in a case removed from the State courts, if he would have been entitled to costs in such court (Field v. Schell, 4 Blatchf. 435; Fed. Cas. No. 4771; Kreager v. Judd, 5 Fed. Rep. 27; Ellis v. Jarvis, 3 Mason, 457; Fed. Cas. No. 4403; Scripps v. Campbell, 22 Int. Rev. Rec. 250; Fed. Cas. No. 12562; Coggill v. Lawrence, 2 Blatchf. 304; Fed. Cas. No. 2957.) The act of Congress of March 3, 1887, raising the minimum amount required to give jurisdiction to a circuit court of the United States, does not by implication raise to the same limit the amount of recovery necessary to carry costs in favor of plaintiff, but a recovery of five hundred dollars is still sufficient under this section. (Johnson v. Watkins, 40 Fed. Rep. 187.) This section was not amended by the act of 1887. (Eastman v. Sherry, 37 Fed. Rep. 844; followed in Johnson v. Watkins, 40 Fed. Rep. 187.) In a suit against three railroad companies, it is too late after judgment to make the objection that

the suits should have been separately brought, or to escape costs caused by defendant's act in separating the verdict and judgment for their own benefit, under Thompson's Code (Tenn.), secs. 2973-2975. Section 968, supra, does not apply to such a case. (Johnson v. Mississippi & T. R. Co., 31 Fed. Rep. 551.) This section changes the rule established by the statute of Gloucester, that the prevailing party should recover his expenses as costs from his adversary; and where the recovery is less than five hundred dollars no costs are allowed, and the common law is in effect restored in such cases. (Gibson v. Memphis & C. R. Co., 31 Fed. Rep. 553.)

§ 497. **Cases under revenue laws—Collectors.** —It shall be the duty of every collector of internal revenue to report within ten days to the district attorney of the district in which any fine, penalty, or forfeiture may be incurred for the violation of any law of the United States relating to the revenue, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, and which may come to his knowledge from time to time, stating the provisions of the law believed to be violated, and on which a reliance may be had for condemnation or conviction; and if any collector shall in any case fail to report to the proper district attorney as prescribed in this section, his right to any compensation, benefit, or allowance in such case shall be forfeited to the United States, and the same may, in the discretion of the secretary of the treasury, be awarded to such persons as may make complaint and prosecute the same to judgment or conviction. (Rev. Stats. sec. 3164.)

§ 498. **Compromises in revenue cases.**—The commissioner of internal revenue, with the advice and consent of the secretary of the treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said secretary and the recommendation of the attorney general, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the commissioner the opinion of the solicitor of internal revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise. (Rev. Stats. sec. 3229.)

§ 499. **Remission of fines.**—The secretary of the treasury is authorized to prescribe such rules and modes of proceeding to ascertain the facts upon which an application for remission of a fine, penalty, or forfeiture is founded, as he deems proper, and, upon ascertaining them, to remit the fine, penalty, or forfeiture, if in his opinion it was incurred without willful negligence or fraud, in either of the following cases:

First. If the fine, penalty, or forfeiture was imposed under authority of any revenue law, and the amount does not exceed one thousand dollars.

Second. Where the case occurred within either of the collection districts in the states of California or Oregon.

Third. If the fine, penalty, or forfeiture was imposed under authority of any provisions of law relating to the importation of merchandise from foreign contiguous territory, or relating to manifests for vessels enrolled or licensed to carry on the coasting trade on the northern, northeastern, and northwestern frontiers.

Fourth. Repealed.

Fifth. If the fine, penalty, or forfeiture was imposed by authority of any provisions of law for levying or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and the case arose within the collection district of Alaska, or was imposed by virtue of any provisions of law relating to fur seals upon the islands of Saint Paul and Saint George. (Rev. Stats. sec. 5293.)

§ 500. **Discontinuances.**—No discontinuance or *nolle prosequi* of any prosecution under section three thousand two hundred and fifty-seven shall be allowed without the permission in writing of the secretary of the treasury and the attorney general. (Rev. Stats. sec. 3230.)

§ 501. **Continuances.**—It shall be lawful for any court in which any suit or criminal proceeding arising under the internal revenue laws may be pending to continue the same at any stage thereof, for good cause shown on motion by the district attorney. (Rev. Stats. sec. 3231.)

§ 502. Costs in revenue suits upon information. —When a suit for the recovery of any penalty or forfeiture accruing under any law providing internal revenue is brought upon information received from any person other than a collector, deputy collector, or inspector of internal revenue, the United States shall not be subject to any costs of suit. (Rev. Stats. sec. 969.)

§ 503. Costs, when reasonable cause of seizure. —When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution; *provided*, that the vessel, goods, wares, or merchandise, be, after judgment, forthwith returned to such claimant or his agent. (Rev. Stats. sec. 970.)

Probable cause.—Probable cause imports a seizure made under circumstances which warrant suspicion. (Lacke v. U. S., 7 Cranch. 339; U. S. v. Gay, 2 Gall. 359; Fed. Cas. No. 15193; The George, 1 Mason, 24; Fed. Cas. No. 5328; United States v. La Jeune Eugenie, 2 Mason, 409; Fed. Cas. No. 15551; Averill v. Smith, 17 Wall. 82; Shattuck v. Maley, 1 Wash. C. C. 245; Fed. Cas. No. 12714; United States v. One Sorrel Horse, 22 Vt. 656; United States v. The Reindeer, 14 Law Rep.

235; Fed. Cas. No. 16145; The La Manche, 25 Law Rep. 585; Fed. Cas. No. 8004.) A certificate may be given where there is a doubt as to the true construction of a statute (U. S. v. Riddle, 5 Cranch, 311; The Paulina v. U. S., 7 Cranch, 52; Averill v. Smith, 17 Wall. 82; The Friendship, 1 Gall. 111; Fed. Cas. No. 5125; United States v. The Reindeer, 14 Law Rep. 235; Fed. Cas. No. 16145); it is never given in the admiralty except in cases under the revenue and navigation acts. (The Marianna Flora, 11 Wheat. 1; The Palmyra, 12 Wheat. 1.) If given the claimant is not entitled to costs (In re Stover, 1 Curt. 93; Fed. Cas. No. 13506); and when given it is a bar to an action for damages for seizure. (Gelston v. Hoyt, 3 Wheat. 246; Averill v. Smith, 17 Wall. 82.) But where the collector does not apply for the certificate until after he has been sued he may be required to pay the costs. (United States v. The Recorder, 2 Blatchf. 119; Fed. Cas. No. 16130); and if the goods are in his hands it is his duty to surrender them as soon as they are acquitted. (Averill v. Smith, 17 Wall. 82.) If there is a decree of acquittal, and a denial of the certificate, the seizure is tortious, and the owner is entitled to full damages (Gelston v. Hoyt, 3 Wheat. 246; The Appollon, 9 Wheat. 362); but the actions to recover damages cannot be commenced while proceedings to enforce the forfeiture are pending. (Gelston v. Hoyt, 3 Wheat. 246; Averill v. Smith, 17 Wall. 82.) The claimant must move the court for the necessary orders to cause the property or its proceeds to be returned to the owner. (Averill v. Smith, 17 Wall. 82.) The opinion of the attorney-general, and the instruction of the secretary of the treasury based thereon, constitute reasonable cause for seizure. (The Recorder, 2 Blatchf. 119; Fed. Cas. No. 16130.) If the goods are taken from the collector the certificate is a protection, although the marshal omits to

return the goods to the owner. (Averill v. Smith, 17 Wall. 82.) And where restitution is accepted without qualification it is a mutual release, and bars all claim for damages. (Lovett v. Bispham, 2 Alb. L. J. 97.) Where a sale of a condemned vessel in the custody of the marshal was, by agreement between the proctors of the parties, postponed, the marshal was entitled to the costs of keeping his watchman also aboard of the vessel. (The San Jacinto, 30 Fed. Rep. 266.)

Costs in admiralty.—In admiralty, the costs are under the control of the court, and do not necessarily follow the rule in equity or admiralty. They may be denied in whole or in part to the prevailing, or even allowed to the losing, party, as in view of all the facts seems proper (Union Ice Co. v. Crowell, 5 U. S. App. 270; 55 Fed. Rep. 87; The E. A. Shores, 79 Fed. Rep. 987). In limited liability proceedings, the costs arising on every contested issue should fall on the losing party; but the expenses of administration, including the fees and other charges of officers of the court and of the commissioner, should be paid from the fund, unless and so far as parties have made issues, and as to this exception the owner stands in the same condition as any other party (H. F. Dimock, 33 U. S. App. 647; 77 Fed. Rep. 226). A vessel owner who in procedings for limitation of liability, desires to give a stipulation in lieu of transferring the vessel to a trustee must pay the taxable costs incident to giving the stipulation, including the expenses of making the appraisal (The H. F. Dimock, 33 U. S. App. 647; 77 Fed. Rep. 226).

§ 504. Double costs on nonsuit in action against officer.—If, in any suit against an officer or other person executing or aiding or assisting in

the seizure of goods, under any act providing for or regulating the collection of duties on imports or tonnage, the plaintiff is nonsuited, or judgment passed against him, the defendant shall recover double costs. (Rev. Stats. sec. 971.)

§ 505. **In copyright suits, costs.**—In all recoveries under the copyright laws, either for damages, forfeitures, or penalties, full costs shall be allowed thereon. (Rev. Stats. sec. 972.)

§ 506. **Costs, infringement of patent.**—When judgment or decree is rendered for the plaintiff or complainant, in any suit at law or in equity, for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered, unless the proper disclaimer, as provided by the patent laws, has been entered at the patent office before the suit was brought. (Rev. Stats. sec. 973.)

Note.—A patentee is not for an infringement entitled to reimbursement for counsel fees paid by him. (Parks v. Booth. 102 U.S. 96.) If the verdict affirms the validity of all the claims, and the novelty of the invention in each, a subsequent disclaimer of one or more claims will not deprive of the right to cost. (Elastic Fabric Co. v. Smith, 100 U. S. 110; Peek v. Frame, 5 Fish. Pat. Cas. 211; Fed. Cas. No. 10904.) Where there is no necessity for filing a disclaimer, a failure to do so does not affect the court's discretion to allow costs to complainant (Gamewell Fire-Alarm

Tel. Co. v. Municipal Signal Co., 33 U. S. App. 714; 77 Fed. Rep. 490).

§ 507. When costs of prosecution to be paid by defendant.—When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital the court may, in its discretion, award that the defendant shall pay the costs of the prosecution. (Rev. Stats. sec. 974.)

§ 508. When costs are recovered by defendant in a prosecution.—If any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution or is nonsuited therein, or if, upon trial, judgment is rendered in favor of the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff is an officer of the United States specially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant. (Rev. Stats. sec. 975.)

§ 509. Fees of clerk, marshal, etc., by whom payable.—If any informer on a penal statute, to whom the penalty, or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution or is nonsuited therein, or if, upon trial, judgment is rendered in favor of the defend-

ant, such informer shall be alone liable to the clerk, marshal, and attorney for the fees of such prosecution, unless he is an officer of the United States whose duty it is to commence such prosecution, and the court certifies that there was reasonable cause for commencing the same, in which case the United States shall be responsible for such fees. (Rev. Stats. sec. 976.)

Note.—The words "the fees of such prosecution" refer to fees for services rendered to the party prosecuting, and to those only. (In re Stover, 1 Curt. 93; Fed. Cas. No. 13506.) If the informer is an officer, and he obtains from the court a certificate of probable cause, the fees must be paid by the United States. (In re Stover, 1 Curt. 93; Fed. Cas. No. 13506.) The name of the informer need not be written at the foot of the indictment. (U. S. v. Mundell, 1 Hughes, 415; Fed. Cas. No. 15834.)

§ 510. **Costs, nonjoinder of action.**—If several actions or processes are instituted, in a court of the United States or one of the Territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court. (Rev. Stats. sec. 977.)

Note.—Two separate libels in admiralty of a like nature, involving substantially the same question, may be consolidated. (Rogers v. Hurney, 4 Cliff. 582; Fed. Cas. No. 2159.)

§ 511. Costs in libels against vessel and cargo.—When proceedings are had before a court of the United States or of the Territories, on several libels against any vessel and cargo, which might legally be joined in one libel, there shall not be allowed thereon more costs than on one libel, unless special cause for libeling the vessel and cargo separately is satisfactorily shown on motion in open court. And in proceedings on several libels or informations against any cargo, or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned. But allowance may be made on one libel or information for the costs incidental to several claims. (Rev. Stats. sec. 978.)

Note.—Where unnecessary libels or claims are filed it is at the peril of paying costs. (The Henry Ewbank, 1 Sum. 400; Fed. Cas. No. 6376.) If two libels are filed simultaneously for seamen's wages, the costs of one libel only and one seizure can be taxed. (The Cabot, Abb. Adm. 150; Fed. Cas. No. 2277; The R. P. Chase, 3 Ware, 294; Fed. Cas. No. 12099.) This section is merely in affirmance of the pre-existing law (Salmon Falls Mfg. Co. v. The Tangier, 3 Ware, 110; Fed. Cas. No. 12267); but there is nothing in this section which compels parties having a like cause of action founded on a several liability to join under a penalty of forfeiture of costs. (The Young Mechanic, 3 Ware, 58; Fed. Cas. No. 18182.)

§ 512. Claimant's costs, when paid before possession.—When judgment is rendered in favor of

the claimant of any vessel or other property seized on behalf of the United States, and libeled or informed against as forfeited under any law thereof, he shall be entitled to possession of the same when his own costs are paid. (Rev. Stats. sec. 979.)

Note.—Claimant must pay the clerk's and marshal's fees before he can take possession of the property. (In re Stover, 1 Curt. 93; Fed. Cas. No. 13506.)

§ 513. **District attorney's costs.**—When a district attorney prosecutes two or more indictments, suits, or proceedings which should be joined, he shall be paid but one bill of costs for all of them. (Rev. Stats. sec. 980.)

Note.—When several attachments for contempt are issued, the district attorney is entitled to only one docket fee. (Riggs v. Supervisors, 1 Woolw. 377; Fed. Cas. No. 4191.)

§ 514. **Taxation of fees of witness.**—In no case shall the fees of more than four witnesses be taxed against the United States, in the examination of any criminal case before a commissioner of a circuit court, unless their materiality and importance are first approved and certified to by the district attorney for the district in which the examination is had; and such taxation shall be subject to revision, as in other cases. (Rev. Stats. sec. 981.)

§ 515. **Attorney liable for costs vexatiously increased.**—If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any territory, appears to have multiplied the proceedings in any cause before

such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased. (Rev. Stats. sec. 982.)

Note.—If a vessel seized under one libel is released on stipulation, it may be taken under successive libels. (The Young Mechanic, 3 Ware, 58; Fed. Cas. No. 18182.) If a proctor presents an unreasonable number of petitions for separate claims his fees may be reduced. (The Hinchman, 7 Chic. L. N. 387; Fed. Cas. No. 7620.)

§ 516. **Bill of costs, how taxed.**—The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases whereby law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause. (Rev. Stats. sec. 983.)

Taxation of costs.—In actions at law the court must tax the costs against the losing party, except where special provision to the contrary has been made by Congress (Trinidad Asphalt Co. v. Robinson, 52 Fed. Rep. 347). The fees of a witness cannot be taxed against the adverse party, unless they have been paid. (Secor v. The Highlander, 19 How. Pr. 334; Fed. Cas. No. 12604). So no costs can be awarded when a case is dismissed for want of jurisdiction. (Abbey v. The Stevens, 22 How. Pr. 78; Fed. Cas. No. 8; Hornthall v. The Collector, 9 Wall. 560; Mayor v. Cooper, 6 Wall. 247;

The McDonnell, 4 Blatchf. 477; Fed. Cas. No. 8756; Maxfield v. Levy, 4 Dall. 330; Agnew v. Dorman, Taney, 386; Fed. Cas. No. 100; Lowe v. Benjamin, 1 Wall. Jr. 187; Fed. Cas. No. 8565; Burnham v. Rangeley, 2 Wood. & M. 417; Fed. Cas. No. 2177; Citizen's Bank v. Cannon, 164 U. S. 319); but this rule does not apply when want of jurisdiction does not appear by the averments of the libel, but is only disclosed by subsequent pleadings or evidence after the parties are in court and in such cases costs may be adjudged against libelant on dismissing the libel (The City of Florence, 56 Fed. Rep. 236). If there are several suits costs are taxed in each (Ferrett v. Atwill, 1 Blatchf. 151; Fed. Cas. No. 4747); and if there are several defendants several costs may be allowed. (Crosby v. Folger, 1 Sum. 514; Fed. Cas. No. 3421.) Where several suits are consolidated costs in each will be taxed up to the time of consolidation and after that only on the consolidated suit. (Simpson v. Caulkins, Abb. Adm. 539; Fed. Cas. No. 12880.) No judgment or decree can be rendered against the United States for costs (U. S. v. La Vengence, 3 Dall. 297; U. S. v. Hooe, 3 Cranch, 73; U. S. v. Barker, 2 Wheaton, 395); nor can a marshal claim a lien for fees (The Antelope, 12 Wheaton, 546); yet a party having such a claim may set it up as a defense in an action against him, brought by the United States (U. S. v. Ringgold, 8 Peters, 150). The court cannot adjudge costs de novo on an appeal from the taxation (The Caithneshire, Abb. Adm. 163; Fed. Cas. No. 2294); and unless the party appealing demands a specification of items, the charge will be considered as acquiesced in (Dedekam v. Vose, 3 Blatchf. 153; Fed. Cas. No. 3731). Where a dispute arises in regard to fees the case should be referred to a person as auditor to hear and report the case (Bottomley v. U. S., 1 Story, 153; Fed. Cas. No. 1689). The Federal fee bill (act of

1853, U. S. Rev. Stats., sec. 983) abolished all former practice and laws on the subject of fees in the courts of the United States, and prescribed the items composing a bill of costs to be taxed against the losing party (O'Neil v. Kansas City S. & M. T. Co., 31 Fed. Rep. 663). Fees for certifying documents not actually certified may not be taxed as costs (Shaw El. Crane Co. v. Shriver, 80 Fed. Rep. 640). In our Federal practice the acts of Congress are not superseded by the State statutes, even if such statutes may be construed as permitting a more indulgent practice (See Ford v. Louisville etc. R. Co., 45 Fed. Rep. 210). In the absence of a rule of court or of a written stipulation so providing the expense of printing briefs, or of procuring copies of the reporter's notes of testimony for the use of the parties, is not taxable (Kelly v. Springfield Ry. Co., 83 Fed. Rep. 183). Allowances to railroad receivers and their attorneys are taxable as costs (Petersburg Sav. & Ins. Co. v. Dellatorre, 30 U. S. App. 504; 70 Fed. Rep. 643). In suits against the United States, when Congress permits it the court may award to plaintiff if he prevails costs of witnesses and fees of clerk (United States v. Harmon, 147 U. S. 268; Marine v. Lyon, 8 U. S. App. 573; 62 Fed. Rep. 153; but see Stanley v. Schwalby, 162 U. S. 255; Carlisle v. Cooper, 26 U. S. App. 240; 64 Fed. Rep. 472). Where, on appeal, it is ordered that a party should recover costs the circuit court can entertain an application for an extra allowance of costs out of the funds, to the counsel of such party (Mason v. Pewabic Min. Co., 153 U. S. 361). The expense of maps necessarily introduced at the trial is taxable (Lilienthal v. Southern Cal. Ry. Co., 61 Fed. Rep. 622). Payments to stenographer for making carbon copies of testimony for use of the party or his counsel are not taxable (Atwood v. Jaques, 63 Fed. Rep. 561; The William

Branfoot, 8 U. S. 129; 52 Fed. Rep. 390). Notarial fees for seals affixed to affidavits used on a motion for a preliminary injunction are taxable (Atwood v. Jaques, 63 Fed. Rep. 561). A reasonable attorney's fee is properly taxable as costs in contempt proceedings (Stahl v. Ertel, 62 Fed. Rep. 920). A party cannot tax as costs more than the amount actually paid to witnesses (Burrow v. Kansas City Ft. S. & M. R. Co., 54 Fed. Rep. 278). The expense of testimony taken de bene esse, obtained solely for the convenience of counsel cannot be taxed as part of the costs in the absence of agreement to that effect (Roundtree v. Rembert, 71 Fed. Rep. 255).

§ 517. **Bill of costs to be sworn to.**—Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or that of some other person having a knowledge of the facts, to be attached to such bill, and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated. (Rev. Stats. sec. 984.)

Note.—The requirement of an affidavit that the services charged have been actually and necessarily performed applies to all cases, and not to government cases only. (Jerman v. Stewart, 12 Fed. Rep. 276.)

§ 518. **Executions to run in all the districts of the State.**—All writs of execution upon judgments or decrees obtained in a circuit or district court, in any State which is divided into two or more districts, may run and be executed in any

part of such State; but shall be issued from, and made returnable to, the court wherein the judgment was obtained. (Rev. Stats. sec. 985.)

Executions.—A writ of execution issued to the marshal of one district may be executed by the marshal of the other district (Provost v. Gorrell, 5 Week. Notes, 151; Fed. Cas. No. 11400); and if a State be divided into two districts, a judgment for one district will be a lien on land in the other district. (Provost v. Gorrell, 5 Week. Notes, 151; Fed. Cas. No. 11400.) A plaintiff who resides in another district may be required to give security for costs. (Lyman V. & R. Co. v. Southard, 12 Blatchf. 405; Fed. Cas. No. 8633.) Jurisdiction to render judgment of fiat executio on the return of nihil to two successive writs of scire facias is obtained in accordance with the rule that the return of two nihils is equivalent to a service (Brown v. Wygant, 163 U. S. 618). When a marshal, in levying execution, forcibly takes property out of the possession of a constable who has levied thereon under a distress warrant or of a pledgee for the benefit of third persons, such action is illegal, and the judgment creditor acquires no right to or lien upon the property (Lewis v. Dillard, 40 U. S. App. 404; 76 Fed. Rep. 688). In general process is not returnable in a different district from that of its issue, except under the Chinese Exclusion Act of 1888 (United States v. Long Hop, 55 Fed. Rep. 58). A judgment does not become final for the purpose of an execution until after a motion for a new trial which has been made and duly filed is disposed of (Danielson v. Northwestern Fuel Co., 55 Fed. Rep. 49).

§ 519. Executions in favor of United States to run in every State.—All writs of execution upon

judgments obtained for the use of the United States in any court thereof, in one State, may run and be executed in any other State or in any Territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained. (Rev. Stats. sec. 986.)

§ 520. Execution stayed on conditions.—When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted the former judgment shall be thereby rendered void. (Rev. Stats. sec. 987.)

Note.—Congress did not intend to suspend the operation of a judgment so as to allow application for a new trial beyond a period of forty-two days from its rendition (Cambuston v. U. S., 95 U. S. 285); and an application to strike out a judgment after the lapse of the term is not within the terms of this section. (Popino v. McAllister, 4 Wash. C. C. 393; Fed. Cas.

No. 11277.) The right to apply for a new trial is independent of this section. It provides for a case where a party desires an extension of the time within which to make application. (Rutheford v. Penn. Mut. Life Ins. Co., 1 Fed. Rep. 456; 1 McCrary, 120.) The motion need not be based upon petition except when made after judgment. (Emma S. M. Co. v. Park, 14 Blatchf. 411; Fed. Cas. No. 4467.)

§ 521. **Judgment debtor, continuance.**—In any state where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term. (Rev. Stats. sec. 988.)

§ 522. **Execution against officers of revenue.**—When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the secretary of the treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury. (Rev. Stats. sec. 989.)

Note.—The term "officer of the revenue" means an officer of the revenue from customs. (Campbell v. James, 18 Blatchf. 196; S. C., 3 Fed. Rep. 515.) His claim for taxable costs not taxed cannot be admitted on a trial unless presented and disallowed. (U. S. v. Ingersoll, Crabbe, 135; Fed. Cas. No. 15440.) A judge may grant the certificate although he is not the judge before whom the verdict was rendered (Cox v. Barney, 14 Blatchf. 289; Fed. Cas. No. 3300); and it may be issued not only to prevent the issuing of an execution, but to stay one already issued. (Cox v. Barney, 14 Blatchf. 289; Fed. Cas. No. 3300.) It is the duty of the court to grant it although the money may not be paid under it. (Cox v. Barney, 14 Blatchf. 289; Fed. Cas. No. 3300.) Whether it ought to be granted cannot be determined before trial. (Andrae v. Redfield, 12 Blatchf. 407; Fed. Cas. No. 367.) The words "officer of the revenue" mean of the revenue of customs. (Campbell v. James, 3 Fed. Rep. 513.) It is not only necessary that there be a recovery against the collector, but there must be a certificate of probable cause before the liability of the government begins. (White v. Arthur, 10 Fed. Rep. 83; following U. S. v. Sherman, 98 U. S. 565.)

§ 523. **Imprisonment for debt.**—No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt provided by the laws of any State shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceed-

ings shall be adopted therein as may be adopted in the courts of such State. (Rev. Stats. sec. 990.)

Arrest of debtor.—A debtor is not liable to arrest on Federal process unless liable to arrest under the State laws (Gray v. Munroe, 1 McLean, 528; Fed. Cas. No. 5724; Wilber v. Ingersoll, 2 McLean, 322; Fed. Cas. No. 17632); and this limitation applies as well to admiralty courts as to others. (The Kentucky, 4 Blatchf. 448; Fed. Cas. No. 7717; Louisiana Ins. Co. v. Nickerson, 2 Low. 310; Fed. Cas. No. 8539; Fry v. Cook, 8 Chic. L. N. 286; Fed. Cas. No. 5138; The Blanche Page, 16 Blatchf. 1; Fed. Cas. No. 1524; but see Gardner v. Isaacson, Abb. Adm. 141; Fed. Cas. No. 5230; Gaines v. Travis, Abb. Adm. 422; Fed. Cas. No. 5180; Hanson v. Fowle, 1 Saw. 497; Fed. Cas. No. 6041; Marshall v. Bazin, 7 N. Y. Leg. Obs. 342; Fed. Cas. No. 9125; Hodge v. Bemis, 12 Law Rep. 470; Fed. Cas. No. 6557.) Where the State law does not allow imprisonment for debt after the debtor has surrendered his property, he cannot be arrested on Federal court process. (Moan v. Wilmarth. 3 Wood. & M. 399; Fed. Cas. No. 9686.) The proceedings in all cases of arrest on mesne process must conform to practice as prescribed by State law. (In re Bergen, 2 Hughes, 513; Fed. Cas. No. 1338.) All constructions in the absence of fraud should lean in favor of personal liberty. (Moan v. Wilmarth, 3 Wood. & M. 399; Fed. Cas. No. 9686.) So where a State law modifies imprisonment for debt the modification is adopted (Low v. Durfee, 5 Fed. Rep. 256; United States v. Tetlow. 2 Low. 159; Fed. Cas. No. 16456; but see Catherwood v. Gapete, 2 Curt. 94; Fed. Cas. No. 2513; In re Freeman, 2 Curt. 491; Fed. Cas. No. 5083; Campbell v. Hadley, 1 Sprague, 470; Fed. Cas. No. 2358); as a law exempting an insolvent who has received a discharge from imprison-

ment (Low v. Durfee, 5 Fed. Rep. 256); or where the State law imposes conditions or restrictions upon the power to imprison a debtor (Catherwood v. Gapete, 2 Curt. 94; Fed. Cas. No. 2513); or where it prohibits imprisonment in certain cases this section adopts the modification. (U. S. v. Tetlow, 2 Low. 159; Fed. Cas. No. 16456.) The verification of papers for the arrest of a debtor may be made before a commissioner of the United States. (Fulton v. Gilmore, 2 Flip. 260; 10 Chic. L. N. 108; Fed. Cas. No. 5154.) Whether defendant is liable to arrest on execution depends on the State statute. (U. S. v. Moller, 10 Ben. 189; Fed. Cas. No. 15793.) A statute which provides that creditors who have caused their debtors to be imprisoned upon writs of ca. resp. or ca. sa. must pay their board weekly in advance, or the debtors will be discharged, is a restriction on imprisonment for debt within the meaning of the above section. (Stroheim v. Deimel, 73 Fed. Rep. 430.)

§ 524. **Discharge from arrest or imprisonment.** —When any person is arrested or imprisoned in any State, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such State. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such State, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the circuit court for the district where the defendant is so held. (Rev. Stats. sec. 991.)

Discharge from arrest.—Where State laws can be executed conveniently and properly by Federal courts and judges, they have been adopted as incident to the remedy, and are cumulative, and in addition to this section (Duncan v. Darst, 1 How. 301); but this section does not adopt State laws prospectively. (In re Freeman, 2 Curt. 491; Fed. Cas. No. 5083; Campbell v. Hadley, 1 Sprague, 470; Fed. Cas. No. 2358.) This section is obligatory on sheriffs, and no discharge from jail under a State law not in conformity therewith will exonerate the sheriff. (McNutt v. Bland, 2 How. 1.) So a discharge by a State official under a State law will not authorize a release from prison on process issued from a Federal court. (McNutt v. Bland, 2 How. 1; Duncan v. Darst, 1 How. 301; Bank v. Tyler, 4 Pet. 366; Catherwood v. Gapete, 2 Curt. 94; Fed. Cas. No. 2513; In re Hopkins, 2 Curt. 567; Fed. Cas. No. 6683.) In adopting State legislation Congress adopted the proceedings only so far as they are analogous and applicable. (Lockhurst v. West, 7 Met. 230.) If the United States sues for a penalty, its judgment can only be enforced by process under State law, and a discharge under a State law will be valid. (Stearns v. U. S., 2 Paine, 300; Fed. Cas. No. 13341; see U. S. v. Tetlow, 2 Low. 159; Fed. Cas. No. 16456; but see U. S. v. Hewes, Crabbe, 307; Fed. Cas. No. 15359.) A discharge under this section does not release the debtor from his liability (King v. Riddle, 7 Cranch, 168); but if the lien of a judgment is surrendered by levying a capias ad satisfaciendum, a discharge under this section will not revive it. (Snead v. McCoull, 12 How. 407.)

§ 525. **Privileges of jail limits.**—Persons imprisoned on process issuing from any court of the United States in civil actions, as well at the suit of the United States as at the suit of any person,

shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective States are entitled to, and under the like regulations and restrictions. (Rev. Stats. sec. 992.)

Note.—This section adopts State laws in force at the time of its passage. (U. S. v. Knight, 14 Peters, 301; S. C., 3 Sum. 358; Fed. Cas. No. 15539.) It embraces executions at the suit of the United States. (U. S. v. Knight, 14 Peters, 301.) When a prisoner is regularly committed to a State jail by the marshal, he is no longer in custody of the marshal nor under his authority or command. (Randolph v. Donaldson, 9 Cranch, 76; see United States v. Harden, 10 Fed. Rep. 802; 4 Hughes, 455.)

§ 526. Goods taken on a fieri facias, how appraised.—When it is required by the laws of any State that goods taken in execution on a writ of *fieri facias* shall be appraised before the sale thereof, the appraisers appointed under the authority of the State may appraise goods taken in execution on a *fieri facias* issued out of any court of the United States, in the same manner as if such writ had issued out of a court of such State. And the marshal in whose custody such goods may be shall summon the appraisers, in the same manner as the sheriff is, by the laws of such State, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement. When such appraisers attend they shall be entitled to the like fees as in cases of appraise-

ment under the laws of the State. (Rev. Stats. sec. 993.)

Note.—This section proceeds on the idea that State appraisement laws have been adopted, and the officer may avail himself of those persons selected by local tribunals to appraise property taken on execution. (Wayman v. Southard, 10 Wheat. 1.)

§ 526 a. **Property, how sold under order of court.**—1. All real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish, or city in which the property, or the greater part thereof, is located or upon the premises, as the court rendering such order or decree of sale may direct. 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this Act, unless in the opinion of the court rendering such order or decree it would be best to sell it in some other manner. 3. That hereafter no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper, printed, regularly issued and having a general circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or State, such notice shall be published in such of the counties where said

property is situated as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper. (27 U. S. Stats. 751.)

Note.—The above act is prospective only. (Central Trust Co. v. Sheffield etc. R. R. Co., 60 Fed. Rep. 9.)

Sale—Publication.—Publication of notice of sale once a week for only twenty-seven days before the day of sale is not a "previous publication" of such a notice "once a week for at least four weeks prior to such sale," as required by the above act. (Wilson v. Northwestern Mut. Life Ins. Co., 27 U. S. App. 526; 65 Fed. Rep. 38.)

§ 527. **Death of marshal after levy or sale.**—When a marshal dies, or is removed from office, or the term of his commission expires, after he has taken in execution, under process from a court of the United States, any lands, tenements, or hereditaments, and before sale or other final disposition thereof, the like process shall issue to the succeeding marshal, and the same proceeding shall be had as if such marshal had not died or been removed, or the term of his commission had not expired. And when a marshal dies or is removed from office, or the term of his commission expires, after he has sold any lands, tenements, or hereditaments, under process from a court of the United States, and before a deed for the same is executed by him to the purchaser, such court

may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by said marshal, order the marshal for the time being to perfect the title and execute a deed to the purchaser, upon his paying the purchase-money and costs remaining unpaid. (Rev. Stats. sec. 994.)

Note.—If a marshal is removed from office after the sale and before the execution of a deed to the purchaser, his successor may execute the deed (Byers v. Fowler, 12 Ark. 218; and if removed after he has made a levy a new writ may be issued to his successor and all rights of the judgment creditor will remain as under the prior writ. (Doolittle v. Bryan, 14 How. 563.) If the purchaser obtains an order directing the successor to make the deed, such order is a mere ex parte proceeding, and not a judicial act. (Merchants' Bank v. Evans, 51 Mo. 335.) A deed executed by the marshal should be admitted to record in the State courts. (Byers v. Fowler, 12 Ark. 218.) And if a State law makes the certificate of purchase assignable, a deed made to such assignee will be valid. (Martin v. Gilmore, 72 Ill. 193.)

§ 528. **Moneys paid into court.**—All moneys paid into court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court; *provided*, that nothing herein shall be construed to prevent the delivery of any such money upon se-

curity, according to agreement of parties, under the direction of the court. (Rev. Stats. sec. 995.)

Money in the hands of the clerk of a court is not liable to attachment. (The Lottawanna, 20 Wall. 201; In re Forsyth, 78 Fed. Rep. 296.) Neither is money in the hands of a designated depositary of the court, placed there pending litigation concerning it, subject to process. (Jones v. Merchants' Nat. Bank, 33 U. S. App. 703; 76 Fed. Rep. 683.) Money received by a master in chancery in payment of property sold upon the foreclosure of a mortgage ought, in pursuance of U. S. Rev. Stats., sec. 995, to be deposited with a designated depositary of the United States; and the clerk is entitled to his commission thereon. (Thomas v. Chicago & C. S. R. Co., 37 Fed. Rep. 548.) Moneys paid into court to the credit of a suit in equity in the same court are to be disposed of in that suit, and no orders relating to such moneys can properly be made in another suit which does not include the same parties as the former suit. (Gregory v. Boston Safe Dep. & T. Co., 144 U. S. 665.) Third parties claiming property levied on by the marshal will not be permitted to take it out of his possession under color of process by means of a separate suit. (St. Paul M. & M. Ry. Co. v. Drake, 44 U. S. App. 271; 72 Fed. Rep. 945.) Generally, as to control of court over money in its hands, see Caesar v. Capell, 83 Fed. Rep. 403.

§ 529. **Moneys deposited, how withdrawn.**— No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on

account of which it is drawn; and it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid, which have remained in the registry of the court unclaimed for ten years or longer, to be deposited in a designated depositary of the United States, to the credit of the United States. (Rev. Stats. sec. 996; as amended, 29 U. S. Stats. 578.)

CHAPTER XXI.

PROCEDURE ON ERROR AND APPEAL.

§ 530. Removal of causes by writ of error.
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§ 546. Where both parties appeal to the supreme court, one record sufficient.

§ 530. **Removal of causes by writ of error.**—There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated

transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. (Rev. Stats. sec. 997.)

Transcript.—A record which is merely authenticated by the clerk or judge is not properly verified (Wilson v. Daniel, 3 Dall. 401); and if the case was tried on an agreed statement of facts, a record which omits the other proceedings is insufficient (Keene v. Whittaker, 13 Peters, 459; Curtis v. Petitpain, 18 How. 109.) If the transcript is returned within proper time with the copy of the writ of error it is sufficient (Mussina v. Cavazos, 6 Wall. 355); as a rigid and literal fulfillment of everything prescribed is not an indispensable requisite to the jurisdiction of the supreme court (Mussina v. Cavazos, 6 Wall. 355); but the original writ of error should be returned. (Mussina v. Cavazos, 6 Wall. 355.) The transcript is sufficient although it omits the names of jurors (Owens v. Hanney, 9 Cranch, 180); and it is sufficient if authenticated by the signature of the deputy clerk and sealed with the seal of the court. (Garneau v. Dozier, 100 U. S. 7.) The certificate of the clerk is prima facie evidence that the transcript is a true copy of all the proceedings in the case. (The Rio Grande, 19 Wall. 178.) A failure to annex to, or return with, a writ of error, an assignment of errors, as required by Rev. Stat., sec. 997, is no ground for dismissal for want of jurisdiction. If the assignment is filed in accordance with the requirements of rule 21, par. 4, it will ordinarily be enough. (School Dist. of Ackley v. Hall, 106 U. S. 428.) Where no assignment of error was returned with the writ of error to a State court, as required by this section, and no counsel appeared for the plaintiff in error, the judgment will be affirmed. (Dagger v. Tayloe, 121 U. S. 286.)

Citation.—The citation is not necessarily a part of the record; the presumption is, that one was issued (Innerarity v. Byrne, 5 How. 295); it is simply a notice to the opposite party to appear or decline to appear (Cohens v. Virginia, 6 Wheat. 264); and judgment cannot be given against him for his nonappearance (Cohens v. Virginia, 6 Wheat. 264); and a clerical error in it will not vitiate the proceedings. (Davidson v. Lainer, 4 Wall. 447.) If it is to appear at the current term of the supreme court the case will be dismissed (Yeaton v. Lenox, 7 Peters, 220); but it may be issued at any time, provided it is issued and served before the term of the supreme court next succeeding the entry of the appeal. (Villalobos v. U. S., 6 How. 81; Hudgins v. Kemp, 18 How. 530.) When issued to one not a party to the suit the writ will be dismissed. (Davenport v. Fletcher, 16 How. 142.) So if it differs from the writ of error in the description of the person it will be dismissed (Kail v. Wetmore, 6 Wall. 451), unless the misdescription is not sufficient to mislead (Peale v. Phipps, 8 How. 256); and although addressed to the original party instead of to the administrator, the counsel may waive the irregularity. (Bigler v. Walter, 12 Wall. 142.)

The writ of error.—No one can sue out the writ unless he is a party to the judgment (Payne v. Niles, 20 How. 219); but if a judgment is joint and several one may sue it out (Cox v. U. S., 6 Peters, 172); but not if the judgment is joint (Williams v. Bank, 11 Wheat. 414; Wilson v. Fire & L. Ins. Co., 12 Peters, 140; Hampton v. House, 13 Wall. 187; Simpson v. Greeley, 20 Wall. 152); yet a party against whom a separate judgment is rendered may sue it out. (Germain v. Mason, 12 Wall. 259.) Where parties have refused to join in a writ of error, one of several parties may sue it out (Masterson v. Herndon, 10 Wall. 416; O'Dowd v. Russell, 14 Wall. 402; but the irregularity is waived

by appearance and defense. (Amis v. Smith, 16 Peters, 303.) A formal petition for the allowance of a writ of error is not requisite to the vesting of jurisdiction. (Louisville Trust Co. v. Stockton, 41 U. S. App. 579; 72 Fed. Rep. 1.) If dismissed on account of irregularity a second may issue (Deneale v. Shimp, 8 Peters, 526); and the names of the parties who apply must be set forth. (Deneale v. Shimp, 8 Peters, 526; Wilson v. Life & F. Ins. Co., 12 Peters, 140.) The issue of a subsequent writ and citation not served cannot prejudice the prior writ and citation. (Davidson v. Lanier, 4 Wall. 447.) If the copy lodged with the clerk is correct it is sufficient. (U. S. v. Six Lots, 1 Woods, 234; Fed. Cas. No. 16299.) Where the writ of error was served before the return day, but not returned until after expiration of the term, an appearance is a waiver of the irregularity (Wood v. Lide, 4 Cranch, 180; Pickett v. Legerwood, 7 Peters, 144); but if not returned at the next term it is null. (Blair v. Miller, 4 Dall. 21.) In case of the death of defendant after entry of judgment, the suit should be revived and the writ of error sued out. (McClane v. Boon, 6 Wall. 244.) The removal of a case into the appellate court by writ of error puts an end to the jurisdiction of the lower court. (Citizens' Bank v. Farwell, 12 U. S. App. 419; 56 Fed. Rep. 539.) It is no part of the duty of the clerk of a Federal court to procure the allowance of writs of error and the approval of bonds, and parties who trust it to him cannot complain of delay therein. (Warner v. Texas Pac. Ry. Co., 2 U. S. App. 647; 54 Fed. Rep. 920.)

Prayer for reversal.—A prayer in a petition for a writ of error that the writ may issue "for the correction of errors so complained of," is in substance a prayer for reversal within the meaning of the above section. (Springfield Safe Dep. & T. Co. v. City of Attica, 56 U. S. App. 330; 85 Fed. Rep. 387.)

§ 531. Citation.—When the writ is issued by a circuit court to a district court, the citation shall be signed by the judge of such district court, or by the circuit judge of such circuit court, or by a justice of the supreme court, and the adverse party shall have at least twenty days' notice. (Rev. Stats. sec. 998.)

§ 532. Citations, supreme court.—When the writ is issued by the supreme court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the supreme court, and the adverse party shall have at least thirty days' notice; and when it is issued by the supreme court to a State court, the citation shall be signed by the chief justice, or judge, or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States, and the adverse party shall have at least thirty days' notice. (Rev. Stats. sec. 999.)

Issued to a State court.—Although the judge of another circuit holds the circuit court, yet he cannot sign a citation when the writ is issued to a State court (Tompkins v. Mahoney, 32 Cal. 231); and if signed by a judge of the district court, the writ will be dismissed. (Palmer v. Donner, 7 Wall. 541.) If judgment was rendered by the appellate court, the writ may be allowed by the chief justice of that court (Aldrich v. Aetna Ins. Co., 8 Wall. 491), or by an associate justice (Bartemeyer v. Iowa, 14 Wall. 26); but no writ can issue without allowance by the proper judge, or the chief justice of the supreme court (Gleason v. Florida, 9 Wall. 779); and the justice has a dis-

cretion in granting or refusing the application for a citation (Hart v. Burnett, 20 Cal. 170; Greely v. Townsend, 25 Cal. 604; see Twitchell v. Com., 7 Wall. 321; Gleason v. Florida, 9 Wall. 779); and the right to a writ ought not to be finally passed upon by a judge at chambers. (Buell v. Van Ness, 8 Wheat. 312.) A certificate of a chief justice of the highest court of a State under this section, allowing a writ of error to such court from the supreme court, certifying that a Federal question arose and was determined adversely to the plaintiff in error, cannot supply the want of all evidence of such question in the record. (Felix v. Scharnweber, 125 U. S. 54; see Butler v. Gage, 138 U. S. 52.)

Thirty days' notice.—A service of citation is necessary to give jurisdiction (Dayton v. Lash, 94 U. S. 112); but service on the attorney or counsel is sufficient (Bacon v. Hart, 1 Black, 38; U. S. v. Curry, 6 How. 106; Bigler v. Waller, 12 Wall. 142); but a service on the partner of counsel is not sufficient if not attorney of record. (Bacon v. Hart, 1 Black, 38.) The citation may be served on the husband of a feme covert. (Fairfax v. Fairfax, 5 Cranch, 19.) Thirty days' notice means thirty days before the return day of the writ of error (Yeaton v. Lenox, 7 Pet. 220), or that defendant shall have at least thirty days' notice before being compelled to go to a hearing (National Bank v. Bank of Commerce, 99 U. S. 608), and a service of the citation after the return day but during the return term is sufficient. (O'Dowd v. Russell, 14 Wall. 402; see Dayton v. Lash, 94 U. S. 112; Railroad Co. v. Blair, 100 U. S. 661.) Service of citation by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant with some adult person who is a member or resident in the family is sufficient. (Tripp v. Santa Rosa St. Ry. Co., 144 U. S.

126.) But depositing a copy of the citation in the postoffice postage paid, addressed to the attorneys, is insufficient. (Tripp v. Santa Rosa Street R. R. Co., 144 U. S. 126.) If the citation is not served thirty days before the first day of the term, the case cannot be taken up at that term except by consent. (Welsh v. Mandeville, 5 Cranch, 321; Lloyd v. Alexander, 1 Cranch, 365.) The time and manner for transmission of the record is regulated by act of Congress. (U. S. v. Curry, 6 How 106; see Lloyd v. Alexander 1 Cranch, 365.) That the citation was served less than thirty days before the return day is not ground for dismissing the appeal. (Andrews v. Thum, 21 U. S. App. 459; 64 Fed. Rep. 149.)

Citation on writ issued to circuit court.—The power to sign the citation is not confined to the justice assigned to the circuit. (Sage v. Railroad Co., 96 U. S. 712.) It may be signed by one of the judges of the territorial court (Sheppard v. Wilson, 5 How. 210); but if signed by the clerk of the circuit court, and not by the judge, it is irregular (U. S. v. Hodge, 3 How. 534; Chaffee v. Hayward, 20 How. 208); neither the signing nor the service of the citation is jurisdictional (Maltingly v. Northwestern Virginia Ry. Co., 158 U. S. 53); but the appearance of defendants on error waives the irregularity. (Aldrich v. Aetna Co., 8 Wall. 491.) It cannot be issued by any judge or justice except the one who allows the writ of error. (Insurance Co. v. Mordecai, 21 How. 195.) A district judge may allow the appeal, although the decree was rendered on appeal from the district court. (Rodd v. Heartt, 17 Wall. 354.) When the appeal is entered in the clerk's office and not taken in open court, a citation signed by him is insufficient. (Villabolos v. U. S., 6 How. 81.) And if the circuit court disallows the appeal, the party presenting a petition to the

supreme court must file a copy of the record. (Ray v. Law, 3 Cranch, 179.) When one of the judges of the circuit court has approved an appeal bond it is competent under this section for another judge of that court who might have granted the appeal to sign the citation. (Farmers' Loan & T. Co. v. Chicago & N. P. Ry. Co., 34 U. S. App. 626; 73 Fed. Rep. 314.)

§ 533. **Bond in error and on appeal.**—Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid. (Rev. Stats. sec. 1000.)

Good and sufficient security.—This section does not prescribe any form of security: a bond given in the usual form has been the uniform practice (Seymour v. Philips & C. Const. Co., 7 Biss. 460; Fed. Cas. No. 12689); but it must be taken before the judge or justice as the clerk alone has no power to take it. (O'Reilly v. Edrington, 96 U. S. 724; National Bank v. Omaha, 96 U. S. 737.) The requirement that the judge shall take good and sufficient security implies that he shall approve the bond, but an approval may be inferred from the facts (Silver v. Ladd, 5 Blatchf. 440); and if the judge who signs the citation takes the oath of the sureties to their sufficiency, it will be inferred that he approved the bond. (Davidson v. Lanier, 4 Wall. 447; Silver v. Ladd, 5 Blatchf. 440.)

If the usual affidavit of the sureties accompanies the bond at the time of its approval no further justification is required unless on allegation of their inability. (Hatch v. Codington, 5 Blatchf. 523: Fed. Cas. No. 6205; see Hobson v. Johnson, 4 Biss. 505; Fed. Cas. No. 6553.) The mere fact that the sureties do not reside in the district is not a reason for objecting to the bond if in other respects unobjectionable. (Ex parte Milwaukee R. Co., 5 Wall. 188.) The bond may be approved by the judge at chambers (Hudgins v. Kemp, 18 How. 530; but if it is insufficient he cannot at chambers require a bond for an additional amount (Butchers' Assn. v. Slaughter House, 1 Woods, 50; Fed. Cas. No. 2234); but if after allowing a supersedeas rule he finds that the bond is insufficient, he may revoke the order. (Black v. Zacharie, 3 How. 483.) The refusal of the circuit court to accept a supersedeas bond during the term does not necessarily take away the power to approve one thereafter. (Sage v. Railroad Co., 96 U. S. 712.) A bond is not sufficient for appeal or for supersedeas unless the obligors are bound for the payments of costs. (Seward v. Corneau, 102 U. S. 161.)

Approval of bond.—It is within the discretion of the judge to approve the bond with a penalty for less than double the amount. (Hatch v. Coddington, 5 Blatchf. 523; Fed. Cas. No. 6205.) And to diminish the amount of the penalty in proportion to the amount of bonds deposited. (Rubber Co. v. Goodyear, 6 Wall. 153.) In case of perishable property the actual loss may be taken into consideration. (Duncan v. M. & O. R. Co., 3 Woods, 597; Fed. Cas. No. 4139.) The judge who signs the citation is the sole and exclusive judge of the sufficiency of the security (Black v. Zacharie, 3 How. 483); as where damages are claimed (Ex parte French, 100 U. S. 1); his action is conclusive

both as to the amount of the surety and the sufficiency of the sureties. (Jerome v. McCarter, 21 Wall. 17; Martin v. Hazard Powd. Co., 93 U. S. 302; Ex parte French, 100 U. S. 1.) After the allowance of the appeal the question of the sufficiency of the security becomes cognizable in the supreme court. (Rubber Co. v. Goodyear, 6 Wall. 153.) The supreme court cannot interfere to enlarge the security to cover damages which plaintiff may recover for mesne profits, or other losses. (Roberts v. Cooper, 19 How. 373.)

Omission to give security.—The provision in this section is merely directory to the judge, and an omission to take the bond does not necessarily avoid the writ or the appeal; the supreme court may in such a case grant the proper relief (Martin v. Hunter, 1 Wheat. 304; Anson v. Blue Ridge R. Co., 23 How. 1; Davidson v. Lanier, 4 Wall. 447; Seymour v. Freer, 5 Wall. 822; but see Boyce v. Grandy, 6 Peters, 777); and the party may be allowed time to give the bond (Anson v. Blue Ridge R. Co., 23 How. 1; Brobst v. Brobst, 2 Wall. 96; Seymour v. Freer, 5 Wall. 822.) If the record shows no security taken the appeal will be dismissed (Boyce v. Grandy, 6 Peters, 777); but the presumption is, that the judge who signed the citation took the security as required by law. (Martin v. Hunter, 1 Wheat. 304.) The objection that the bond was given by only one of several appellants may be taken by a preliminary motion to dismiss. (Mandeville v. Riggs, 2 Peters, 482.) The defendant must procure sureties although he is amply responsible (Amer. Pave. Co. v. Elizabeth, 6 Off. Gaz. 772; Fed. Cas. No. 310); but the law does not require that the security shall be in any fixed proportion to the decree. (Amer. Pave. Co. v. Elizabeth, 6 Off. Gaz. 772, Fed. Cas. No. 310.) In a proceeding on the relation of a party the bond may run to the State or to the relator. (Spalding v. People, 2 How. 66.) The

amount recovered on execution is not to be apportioned where the unpaid balance exceeds the penalty of the bond. (Ives v. Merchants' Bank, 12 How. 159.) The proceeds of the sale must be first applied to the decree and the sureties left liable for the balance, (Sessions v. Pintard, 18 How. 106.) The omission to give the security as provided in this section is an irregularity merely, which may be subsequently cured. (Brown v. McConnell, 124 U. S. 489; Stewart v. Masterson, 124 U. S. 493.) The circuit court has no authority to grant an appeal without requiring bond for costs. (In re Newman, 79 Fed. Rep. 615.)

Security on appeal.—The appeal bond must be given to the opposite party (Bigler v. Waller, 12 Wall. 142), or it will be dismissed (Davenport v. Fletcher, 16 How. 142); yet if irregular in this regard, time may be allowed to file a correct bond. (Bigler v. Waller, 12 Wall. 142.) Appellant must either give good and sufficient security to answer all damages and costs, or if he does not wish to supersede execution, sufficient security to answer for costs in case of affirmance. (Hayford v. Griffith, 3 Blatchf. 34; Fed. Cas. No. 6263.) A condition to the effect that appellant will pay the damages and costs and damages rendered and to be rendered till decree is affirmed, covers the requirements of the statute (Gay v. Parpart, 101 U. S. 391); but it need not be sufficient to secure interest pending appeal. (Jerome v. McCarter, 21 Wall. 17.) When taken from an order directing the sale of property, the penalty will be little more than interest on the debt while the sale of the property was suspended. (Wilmer v. Atlanta etc. Co., 2 Woods, 447; Fed. Cas. No. 17776.) When the property necessarily follows the writ, indemnity to an amount sufficient to secure the sum received for use of the property and for incidental items is sufficient. (French v.

Shoemaker, 12 Wall. 86.) A defendant in an equity suit may be compelled to pay the sum allowed to the master as compensation for his services, although an appeal is duly taken. (Myers v. Dunbar, 12 Blatchf. 380; Fed. Cas. No. 9990.) If a bill is dismissed without qualification, a preliminary injunction falls, although an appeal is taken. (Eureka Consol. Min. Co. v. Richmond Min. Co., 5 Saw. 121; Fed. Cas. No. 4549.)

On writ of error.—If the judgment is severable, each may file a separate bond. (Ex parte French, 100 U. S. 1.) When it operates as a supersedeas the security must be sufficient to satisfy the whole amount of the judgment (Catlett v. Brodie, 9 Wheat. 553; Tucker v. Lee, 3 Cranch C. C. 684; Fed. Cas. No. 14221; Bank v. Swann, 4 Cranch C. C. 139; Fed. Cas. No. 902); but see Renner v. Bank, 2 Cranch C. C. 310; Fed. Cas. No. 11699); and the judge cannot exercise any discretion. (Stafford v. Union Bank, 16 How. 135; 17 How 275.) The condition of the bond is alternative that plaintiff in error either prosecutes his writ to effect or answers all damages and costs. (Tucker v. Lee, 3 Cranch C. C. 684; Fed. Cas. No. 14221.) A writ of error becomes per se a supersedeas upon compliance with the statute (Tiernan v. Booth, 4 Fed. Rep. 620; 9 Biss. 499; Booth v. Tiernan, 109 U. S. 205; Arnold v. Frost, 9 Ben. 267; Fed. Cas. No. 558), if a citation is issued and served before the next ensuing term of the supreme court (Arnold v. Frost, 9 Ben. 267; Fed. Cas. No. 558), where nothing appears in the record to the contrary (French v. Shoemaker, 12 Wall. 86); but if the value of the matter in dispute does not appear in the record it cannot operate as a supersedeas. (Williamson v. Kincaid, 4 Dall. 20.) A writ of error sued out in a criminal case in a State court stays execution of the sentence. (Bryan v. Bates, 12 Allen, 201.) A State court cannot determine

whether a writ of error operates as a supersedeas or not. (Ex parte Dunn, 6 S. C. 307.) The fact that a citation was not presented to and signed by the judge within sixty days will not necessarily prevent a writ of error from operating as a supersedeas. (Tiernan v. Booth, 4 Fed. Rep. 620; 9 Biss. 499; Booth v. Tiernan, 109 U. S. 205.)

Appeal—Supersedeas.—If a bond given on an appeal from a foreclosure decree is merely for costs, it will not stay the sale (Stafford v. Union Bank, 16 How. 135; 17 How. 275; Orchard v. Hughes, 1 Wall. 73); but the appeal will not be dismissed for that reason. (Orchard v. Hughes, 1 Wall. 73.) An appeal from a decree disallowing an injunction against a judgment at law does not supersede the judgment. (Grundy v. Young, 1 Cranch C. C. 443; Fed. Cas. No. 5850.) If the property is in charge of a receiver, an appeal operating as a supersedeas will not entitle the party to a delivery of the property to him. (Schenk v. Peay, 1 Dill. 267; Fed. Cas. No. 12451.) The supersedeas is but an appurtenant to the appeal and ends when the appeal becomes inoperative as by neglect to file the transcript. (Gillette v. Bullard, 20 Wall. 571.) Appealing and giving security operate as a stay of proceedings. (Fischer v. Hayes, 7 Fed. Rep. 99; 19 Blatchf. 184.) The condition of the bond that appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed" meets all the requirements of this section. (Gay v. Parpart, 101 U. S. 391; see Babbitt v. Finn, 101 U. S. 7.) The court may modify a supersedeas so as to allow a sale of mortgaged property. (Williams v. Claflin, 103 U. S. 753; following Jerome v. McCarter, 21 Wall. 31.)

Effect of supersedeas.—The only effect of a supersedeas is to prevent further proceedings in the lower court; it does not operate to nullify or to reverse an injunction. (Slaughter House Cases, 10 Wall. 273; Whitney v. Mowry, 2 Bond, 45; Fed. Cas. No. 17592.) After appeal in a prize case the district court can make no order concerning the property (The Peterhoff, Blatchf. Prize, 620; Fed. Cas. No. 11025); and no sale of the property can take place (The Sunbeam, Blatchf. Prize, 638; Fed. Cas. No. 13614), nor can the court attach for contempt for neglecting to comply with a judgment. (Frazee v. Cordozo, 6 S. C. 315.) The supersedeas operates to prevent the payment out of a fund in court. (Goddard v. Ordway, 94 U. S. 672.) If an execution is improperly issued where there is a supersedeas the circuit court may on motion quash it (Stockton v. Bishop, 2 How. 74); but if the bond is filed after execution of the writ the court will not restore the party to his prior rights. (Board v. Gorman, 19 Wall. 661.) A judgment in a State court awarding a peremptory mandamus cannot be executed if defendant file a bond. (State v. Johnson, 29 La. Ann. 399; U. S. v. Columbian Ins. Co., 2 Cranch C. C. 266; Fed. Cas. No. 14840.)

Liability of surety.—The sureties become liable if judgment is affirmed in the circuit court, and they are not discharged, although the case is taken to the supreme court, and a new bond is given. (Babbitt v. Finn, 101 U. S. 7.) And if judgment is affirmed an action lies on the bond without first issuing execution against defendant (Babbitt v. Finn, 101 U. S. 7); but on the action there must be an allegation of a single breach denying each alternative that the writ was not prosecuted with effect, nor did the plaintiff in error answer the damages and costs, which must be specially set forth. (Tucker v. Lee, 3 Cranch C. C.

684, Fed. Cas. No. 14221; Bank v. Swann, 4 Cranch C. C. 139, Fed. Cas. No. 902.) Interest on the penalty from the time of demand may be recovered. (Ives v. Merchants' Bank, 12 How. 159.) Under this section the damages recoverable on an appeal bond are such only as result from the delay in the sale of the property, and do not include accumulated interest. (Supervisors v. Kennicott, 103 U. S. 554.) Sureties on an appeal bond will be protected when they have acted in good faith. (Bayliss v. Lafayette etc. R. Co., 9 Biss. 90, Fed. Cas. No. 1141.)

§ 534. **No bond required of United States.**—Whenever a writ of error, appeal, or other process in law, admiralty, or equity issues from or is brought up to the supreme court, or a circuit court, either by the United States or by direction of any department of the Government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted. (Rev. Stats. sec. 1001.)

Note.—No bond in suing out an attachment need be given by the United States. (U. S. v. Ottman, 1 Hughes, 313, 21 Int. Rev. Rec. 294; Fed. Cas. No. 15977.)

§ 535. **Writs of error to district courts acting as circuit courts.**—Writs of error shall be prose-

cuted from the final judgments of district courts acting as circuit courts to the supreme court in the same manner as from the final judgment of circuit courts. (Rev. Stats. sec. 1002.)

§ 536. **Writs of error to State courts.**—Writs of error from the supreme court to a State court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States. (Rev. Stats. sec. 1003.)

Error to State courts.—A writ of error will not be allowed on application of an attorney not acting for appellant directly (Ex parte Dorr, 3 How. 103); and it must be brought in the name of the claimant who appeared to defend the action (The Burns, 9 Wall. 237); and issues under "regulations" of the United States courts (Buell v. Van Ness, 8 Wheat. 312); and be allowed by the circuit judge, and bear the seal of the court and signature of the clerk. (Buell v. Van Ness, 8 Wheat. 312.) It need not on its face purport to be issued upon a final judgment of the highest court in the State, for it is the act of the court, and its object is to bring up the record, and cite the parties. (Buell v. Van Ness, 8 Wheat. 312.) A mistake in the date does not vitiate it (O'Dowd v. Russell, 14 Wall. 402); nor is it objectionable that it bears teste on the date of its issue. (Atherton v. Fowler, 91 U. S. 143.) As to the return of the writ, the law makes no distinction between criminal and civil cases. (Worcester v. State, 6 Peters, 515.) If the clerk omits to make return, a rule of court may require him to make return on the first day of the next term, or show cause or excuse for his neglect. (U.

S. v. Booth, 18 How. 476.) If the record is duly certified by the clerk of the State court, authenticated by seal of the court, and annexed to the writ, it is sufficient (Martin v. Hunter, 1 Wheat. 304; Worcester v. State, 6 Peters, 515), although the certificate of the judge is not appended (Worcester v. State. 6 Peters, 515), if it contains the judgment duly certified, over which the supreme court can exercise jurisdiction. (Webster v. Reid, 11 How. 437.)

§ 537. **Writs of error returnable to the supreme court.**—Writs of error returnable to the supreme court may be issued as well by the clerks of the circuit courts, under the seals thereof, as by the clerk of the supreme court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the supreme court, in pursuance of section nine of the Act of May eight, seventeen hundred and ninety-two, chapter thirty-six. (Rev. Stats. sec. 1004.)

Return of writ.—The writ of error is the writ of the supreme court (Mussina v. Cavazos, 6 Wall. 355); and a clerk of the circuit court has no right to change its form without consent of the supreme court justices. (Barton v. Forsyth, 5 Wall. 190.) It need not be allowed by any judge; that it is issued and served by copy is sufficient. (Davidson v. Lanier, 4 Wall. 447.) When issued to the supreme court of a territory, it may be issued by the clerk of the territorial court. (Sheppard v. Wilson, 5 How. 210.) Prior to the adoption of this section a clerk of the circuit court could not issue the writ. (West v. Barnes, 2 Dall. 401.)

§ 538. **Amendment of writ of error.**—The supreme court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form; *provided,* the defect has not prejudiced, and the amendment will not injure, the defendant in error. (Rev. Stats. sec. 1005.)

Amendment.—This section is applicable to the circuit court of appeals (Cotter v. Alabama G. S. R. Co., 22 U. S. App. 372; 61 Fed. Rep. 747). Before the adoption of this section a writ of error could not be amended. (Insurance Co. v. Mordecai, 21 How. 195; Porter v. Foley, 21 How. 393; Hodge v. Williams, 22 How. 37; Washington v. Dennison, 6 Wall. 495.) The right to amend under this section is not absolute, but is within the discretion of the court (Pearson v. Yewdall, 95 U. S. 294); and where the record presents no question which has not been previously decided, leave to amend will not be granted. (Pearson v. Yewdall, 95 U. S. 294.) A writ of error without a seal is void. (Washington v. Dennison, 6 Wall. 495.) But it may be amended by affixing the seal (Cotter v. Alabama G. S. R. Co., 22 U. S. App. 372; 61 Fed. Rep. 747.) If the writ is not tested as of a preceding term the teste may be amended by the record of duration of that term (Course v. Stead, 4 Dall. 22); but the mere fact that it is dated before the entry of the judgment will

not vitiate it if served after that time. (O'Dowd v. Russell, 14 Wall. 402.) If there is sufficient in the record to amend by, an omission may be amended. (Course v. Stead, 4 Dall. 22.) So if the names of parties are not set forth in the writ (Deneale v. Stump, 8 Peters, 526), or if an appeal is taken in the name of the firm instead of the name of the individual member of the firm. (Moore v. Simonds, 100 U. S. 145.) The name of the present administrator of an estate as plaintiff in error may be inserted in place of the former administrator (Walton v. Marietta Chair Co., 157 U. S. 342). If the writ is made returnable on the wrong day (National Bk. v. Bank of Commerce, 99 U. S. 608; Hampton v. Rouse, 15 Wall. 684), or the day is described imperfectly (McVeigh v. U. S., 8 Wall. 640), or left blank (Mossman v. Higginson, 4 Dall. 12), it may be amended by inserting the proper return day (Atherton v. Fowler, 91 U. S. 143); and a new citation will be issued. (National Bk. v. Bank of Commerce, 99 U. S. 608; Dayton v. Lash, 94 U. S. 112.) Where the record shows who are the members of the partnership, and an appeal has been taken in the name of the firm, the defect may be cured by amendment. (Moore v. Simonds, 100 U. S. 145.) A paper purporting to be a writ of error, but not being such, is not susceptible of amendment under this section. (Bondurant v. Watson, 103 U. S. 281.) Under section 1005 of the Revised Statutes, being section 3 of the act of June 1, 1872 (chap. 255, 17 Stat. at L. 196), this court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error "when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record," "provided the defect has not prejudiced and the amendment will not injure, the defendant in error." (Estes v. Trabue, 128

U. S. 225.) In Moore v. Simonds, 100 U. S. 145, an appeal was taken in the name of a firm, but it was taken when section 1005 was in force. This court said: "We are clear, therefore, that the defect is one that may be amended under the law as it now stands, and for this reason we will not dismiss the appeal." (Estes v. Trabue, 128 U. S. 225.)

§ 539. **Amendments in prize appeals.**—The supreme court may, if in its judgment the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize causes. [See sec. 4636.] (Rev. Stats. sec. 1006.)

Note.—An appeal may be allowed whenever the purposes of justice require it. (La Nuestra Senora de Regla, 17 Wall. 29.)

§ 540. **Supersedeas.**—In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days. (Rev. Stats. sec. 1007, 18 U. S. Stats. 318.)

Supersedeas.—A writ of error served after the return day is void (Wood v. Lide, 4 Cranch, 180), and if sued out after expiration of the sixty days it cannot operate as a supersedeas. (Grundy v. Young, 1 Cranch C. C. 443; Fed. Cas. No. 5850; Hogan v. Ross, 11 How. 294; Saltmarsh v. Tuthill, 12 How. 387.) So if informal it ceases to operate as a supersedeas. (Hogan v. Ross, 11 How. 294.) The supersedeas is a statutory remedy, and can only be obtained by a strict compliance with the statute. (Sage v. Central R. R. Co., 93 U. S. 412.) The writ will not operate as a supersedeas unless sued out and a copy filed in the clerk's office. (Moore v. Dunlop, 1 Cranch C. C. 180; Fed. Cas. 9759; Ex parte Ben, 1 Cranch C. C. 532; Fed. Cas. No. 1285; Railroad Co. v. Harris, 7 Wall. 574; O'Dowd v. Russell, 14 Wall. 402; Kitchen v. Randolph, 93 U. S. 86; contra, Telegraph Co. v. Eyser, 19 Wall. 419.) Such service as is required on writ of error is not required in case of appeal. (Bigler v. Waller, 12 Wall. 142.) Where the appeal is improperly refused, judgment on a mandamus may direct that the security for a supersedeas be accepted as of the date of the appeal. (Ex parte Railroad Co., 95 U. S. 221.) And an appeal subsequently allowed vacates all acts done before its allowance. (Thornhill v. Bank, 4 Am. L. T. 245; Fed. Cas. No. 13991.) If the approval of a supersedeas bond is obtained by fraud it may be vacated (Railroad Co. v. Schutte, 100 U. S. 644), and no new bond will be taken. (Railroad Co. v. Schutte, 100 U. S. 644.) Under the Judiciary Act of 1789 and the act of 1803, an appeal or writ of error, to operate as a supersedeas, must be taken and security given within ten days after the rendition of the judgment or decree. (Adams v. Law, 16 How. 144; Hudgins v. Kemp, 18 How. 530; Silsby v. Foot, 20 How. 290; Washington v. Dennison, 6 Wall. 495;

Patterson v. De La Ronde, 8 Wall. 293; Washington etc. R. R. Co. v. Bradleys, 7 Wall. 575.) Nor could the circuit court award a supersedeas unless the writ of error is taken within such time. (Hogan v. Ross, 11 How. 294.) Under Rev. Stat., sec. 1007, as amended by 18 Stat. at L. 318, a supersedeas cannot be allowed where an appeal was not taken or a writ of error sued out and served within sixty days, Sundays exclusive, after judgment. (Kitchen v. Randolph, 93 U. S. 86; Sage v. Central R. Co., 93 U. S., 412; Rodd v. Heartt, 17 Wall. 354; Texas & P. R. Co. v. Murphy, 111 U. S. 488; Wurts v. Hoagland, 105 U. S. 701; Peugh v. Davis, 110 U. S. 227.) To make a nunc pro tunc order for a supersedeas effectual, it must appear that the delay was the act of the court, and that injustice will not be done. (Sage v. Central R. R. Co., 93 U. S. 412.) The service of the writ of error must be within sixty days, "Sundays excluded," and security must be given "within sixty days" after the rendition of such judgment, or afterward by special permission. This can only mean that he may give the security and so obtain the supersedeas within the same sixty days which is allowed him to serve the writ. (Town of Danville v. Brown, 128 U. S. 503.) This section does not apply to judgments in the highest court of a State. (Foster v. Kansas, 112 U. S. 201.) It refers only to judgments and decrees in the courts of the United States, and not to State courts. (Doyle v. Wisconsin, 94 U. S. 50; Foster v. Kansas, 112 U. S. 201.) A supersedeas, in order to stay proceedings on an execution, must come before a levy is made. (Boyle v. Zacharie, 6 Pet. 648.)

Time to file security.—Time is an essential element which cannot be disregarded, and to make a nunc pro tunc order effectual it must appear that the delay was the fault of the court, and not of the parties. (Sage v. Central R. R. Co., 93 U. S. 412.) Where the

security of a supersedeas bond becomes impaired, the supreme court will order and adjudge it to be made sufficient by additional security. (Williams v. Claflin, 103 U. S. 753; Jerome v. McCarter, 21 Wall. 17.) The time begins to run from the announcement of the decision, although the record is not signed till next day. (Board v. Gorman, 19 Wall. 661.) The right of appeal is determined by the entry of the final decree, although entered as of a prior date (Rubber Co. v. Goodyear, 6 Wall. 153); but not till the actual filing of the decree (Seymour v. Freer, 5 Wall. 822); so a judgment is not final till it is entered in the court. (Green v. Van Buskirk, 3 Wall. 448.) So the time begins to run from entry of the decree, although it provides for the taxation of costs, which are not taxed till after the time allowed for an appeal (Craig v. The Hartford, 1 McAll. 91; Fed. Cas. No. 3333); but if the court entertains a motion to open the decree the time does not begin to run until the motion is disposed of. (Brockett v. Brockett, 2 How. 238; Railroad Co. v. Bradleys, 7 Wall. 575; Memphis v. Brown, 94 U. S. 715.) Although the writ is served before the expiration of the sixty days, yet if not sealed till after that time it cannot operate as a supersedeas. (Washington v. Dennison, 6 Wall. 495.) An appeal taken after sixty days cannot be allowed nunc pro tunc. (Sage v. Central R. R. Co., 93 U. S. 412; The Roanoke, 3 Blatchf. 390; Fed. Cas. No. 11875.) Where a motion for a new trial is filed the time begins to run from the day it is overruled. (Rutherford v. Penn. Mut. L. Ins. Co., 1 Fed. Rep. 456; 1 McCrary, 120; see Hatch v. Coddington, 5 Blatchf. 523; Fed. Cas. No. 6205.) The circuit court, during the term, may strike out and enter a judgment anew for the purpose of allowing a writ of error to operate as a supersedeas (Memphis v. Brown, 94 U. S. 715), but if it is improperly awarded the motion should be to discharge the order

(Hudgins v. Kemp, 18 How. 530); and although an order has all the requisites of a decree, yet if followed by a decree the appeal will be regarded as taken from the latter (Rubber Co. v. Goodyear, 6 Wall. 153), and if it refers the case to a commissioner and another decree is entered, the time runs from either decree. (Rodd v. Heartt, 17 Wall. 354.) If an intervenor moves to set aside a decree the motion does not suspend the decree. (Sage v. Central R. R. Co., 93 U. S. 412.) Under section 11 of the act of June 1, 1872, the supersedeas bond may be executed and a supersedeas obtained within sixty days after the rendition of the judgment, and later with the permission of the designated judge. (Western U. Telegraph Co. v. Eyser, 19 Wall. 419; Boise County v. Gorman, 19 Wall. 661; see United States v. Addison, 22 How. 174; Stockton v. Bishop, 2 How. 74.)

Writ of error as supersedeas.—A writ of error becomes a supersedeas per se where the party suing it out complies with the statute. (Tiernan v. Booth, 9 Biss. 499; 4 Fed. Rep. 620.) It will operate as a supersedeas if duly served within sixty days, Sunday exclusive, after motion for new trial overruled. (Rutherford v. Penn. Mut. L. Ins. Co., 1 Fed. Rep. 456; 1 McCrary, 120; Tiernan v. Booth, 9 Biss. 499; 4 Fed. Rep. 620; Arnold v. Frost, 9 Ben. 267; Fed. Cas. No. 558.) If the writ of error is too late to operate as a supersedeas the supreme court will not quash a writ of possession issued to enforce the decree. (Wallen v. Williams, 7 Cranch, 278.) The court will not grant a writ of possession where there was a mere technical defect in the supersedeas. (Tiernan v. Booth, 9 Biss. 499; 4 Fed. Rep. 620.) The circuit court has no power to stay the execution on the ground of mistake (Saltmarsh v. Tuthill, 12 How. 387); and there is nothing to prevent the clerk from preparing an execution before the sixty days; but it

cannot be issued before the expiration of the sixty days. (Board v. Gorman, 19 Wall. 661; Ex parte Dunn, 6 S. C. 307.) The prohibition of the issuance of execution until after a certain time refers only to judgments and decrees of Federal courts. (Doyle v. Wisconsin, 94 U. S. 50.) Although the bond is filed within the sixty days, yet the writ will not operate as a supersedeas unless a copy thereof is lodged in the clerk's office within sixty days (Railroad Co. v. Harris, 7 Wall. 574; see Thornhill v. Bank, 4 Am. L. T., N. S., 245; Fed. Cas. No. 13991; Thompson v. Voss, 1 Cranch C. C. 108; Fed. Cas. No. 13979; Adams v. Law, 16 How. 144); but if the district court extends the time for giving the bond, when taken it relates back to the time of taking the appeal (Dutcher v. Woodhull, 7 Ben. 313; Fed. Cas. No. 4204); and if the writ of error is sued out and served within the sixty days, the required security may be given after the service. (Kitchen v. Randolph, 93 U. S. 86.) The service of the writ of error or the perfection of the appeal within sixty days is an indispensable prerequisite to a supersedeas, and no stay of process can be granted on the judgment if this is not done. (Kitchen v. Randolph, 93 U. S. 86; Sage v. Central R. R. Co., 93 U. S. 412.) A bond filed on the taking of an appeal in an action at law cannot operate as a supersedeas (Saltmarsh v. Tuthill, 12 How. 387); and if no bond is filed to stay execution of the decree appellant cannot complain on account of its enforcement. (Soutter v. La Crosse Railroad, 1 Woolw. 80; Fed. Cas. No. 13180.) Where a petition is filed for a rehearing in the State court, the granting of a writ of error and the filing of the bond within sixty days will operate as a supersedeas. (Slaughter House Cases, 10 Wall. 273.) Where the decree is special, and its terms are to be subsequently settled, the appellant may file the bond within sixty days after entry of the decision, or within sixty days

after the entry of the decree (Silsby v. Foote, 20 How. 290); and if he does not give the bond within sixty days he may nevertheless sue out his writ of error or take his appeal at any time within two years upon giving security to cover the costs. (Saltmarsh v. Tuthill, 12 How. 387; Hudgins v. Kemp, 18 How. 530; The Roanoke, 3 Blatchf. 390; Fed. Cas. No. 11875.) After acceptance of a bond in awarding a supersedeas the jurisdiction of the lower court ceases and it attaches here, and the lower court cannot make an order requiring additional security. (Keyser v. Farr, 105 U. S. 265.) Sundays are to be excluded in the computation of time under the last clause of the above section. (Danielson v. Northwestern Fuel Co., 55 Fed. Rep. 49.)

§ 541. Writs of error and appeals to supreme court, time for taking.—No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the supreme court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order; *provided,* that where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability. [See sec. 635.] (Rev. Stats. sec. 1008.)

Within what time.—A writ of error (Gelston v. Hoyt, 3 Wheat, 246; Brooks v. Norris, 11 How. 204) or an appeal (U. S. v. Pacheco, 20 How. 261) must be allowed within two years, or the court may

disallow the appeal; but if the appeal was allowed within the two years, the court may accept the security after that time and allow the appeal nunc pro tunc. (Brandres v. Cochrane, 13 Fed. Rep. 142, notes; The Dos Hermanos, 10 Wheat. 306.) The limitation prescribed by this section does not apply to writs of error coram nobis. (Strode v. Stafford Justices, 1 Brock. 162; Fed. Cas. 13537.) If an opinion is filed containing directions for a decree there is no decree until it is filed, and if subsequently amended the last is the final decree. (U. S. v. Gomez, 1 Wall. 690; McGarrahan v. Maxwell, 28 Cal. 75.) If a motion for a new trial is not filed during the term when judgment was rendered, the time notwithstanding runs from the entry of the judgment. (Cambuston v. U. S., 95 U. S. 285.) The period of the rebellion is not to be included in determining whether writ has been sued out within the proper time. (The Protector, 9 Wall. 687.) If a writ of error is barred by the statute the objection may be made by motion. (Brooks v. Norris, 11 How. 204; see Chapman v. Barney, 129 U. S. 677.)

§ 542. **Appeals in prize causes, within what time.**—Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time, for cause shown in the particular case; *provided*, that the supreme court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or of intention to appeal, was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein. [See secs. 695, 4636.] (Rev. Stats. sec. 1009.)

Note.—Where notice of appeal or of intention to appeal was filed in the district court within thirty days next after final decree, an appeal will be allowed when justice requires it. (La Nuestra Senora de Regla, 17 Wall. 29.)

§ 543. Damages and costs on affirmance in error.—Where, upon a writ of error, judgment is affirmed in the supreme court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion. (Rev. Stats. sec. 1010.)

Note.—This section applies to decrees in equity as well as to judgments at law. (Perkins v. Fourniquet, 14 How. 328.)

Damages for delay.—There can be no allowance for damages but for the delay. (Cotton v. Wallace, 3 Dall. 302.) If the principle involved in the case was controverted at the time the writ of error was sued out, damages will not be allowed (McKee v. Rains, 10 Wall. 22); but if every question involved had been settled, damages for delay will be allowed. (Pennywit v. Eaton, 15 Wall. 380.) When the writ is sued out merely for delay, damages at the rate of ten per cent on the judgment from its date will be allowed (Barrow v. Hill, 13 How. 54; Kilbourne v. State Sav. Inst., 22 How. 503; Sutton v. Bancroft, 23 How. 320; Jenkins v. Banning, 23 How. 455; Prentice v. Pickersgill, 6 Wall. 511; Insurance Co. v. Huchberger, 12 Wall. 164; Hennessey v. Shelden, 12 Wall. 440; Hall v. Jordan, 19 Wall. 271); but not more than ten per cent; yet less may be given. (West Wis. R. R. Co. v. Foley, 94 U. S. 100.) Where money in hands of a marshal is stopped by a third person, no increase of damages will be allowed. (Jennings v. The Perseverance, 3 Dall. 336.) Damages for de-

lay are not allowed on affirmance of a decree in admiralty (The Douro, 3 Wall. 564), and the allowance of interest on the affirmance of a decree in admiralty is not an incident, but lies in the discretion of the court. (Hemmenway v. Fisher, 20 How. 255.) When a judgment is affirmed, interest will be allowed from the date of its rendition in the circuit court. (Brown v. Van Braam, 3 Dall. 344; Bank v. Wistar, 3 Peters, 431; Mitchell v. Harmony, 13 How. 116; Perkins v. Fourniquet, 14 How. 328; Hemmenway v. Fisher, 20 How. 255.) The amount of the bond on granting a supersedeas is to be determined by the circuit court under the laws and rules of the supreme court. (U. S. v. New Orleans, 8 Fed. Rep. 112.)

§ 544. **Reversal on error limited.**—There shall be no reversal in the supreme court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. (Rev. Stats. sec. 1011.)

Reversal—Review of facts.—This section applies to the court of appeals (Hall v. Houghton etc. Mercantile Co., 19 U. S. App. 644; 60 Fed. Rep. 350). If the circuit court sustains a plea in abatement the judgment cannot be reversed on error. (Piquignot v. Pennsylvania R. R. Co., 16 How. 104; see Stafford v. Union Bank, 16 How. 135.) The above section does not forbid the review of a decision of a question of jurisdiction depending on the sufficiency of the service of summons (Goldey v. Morning News, 156 U. S. 518). Under the above section the sufficiency of the evidence to sustain the findings of the court can only be presented for review by a request for a peremptory holding that on the undisputed facts the finding must be otherwise (Citizens' Bank of Wichita v. Far-

well, 27 U. S. App. 268; 63 Fed. Rep. 117; Rhodes v. United States Nat. Bank, 24 U. S. App. 607; 66 Fed. Rep. 512; National Bank of Commerce v. First Nat. Bank, 27 U. S. App. 88; 61 Fed. Rep. 809; Rodecker v. Littauer, 19 U. S. App. 455; 59 Fed. Rep. 857; Board of Commissioners v. McMaster, 32 U. S. App. 367; 68 Fed. Rep. 177; Searcy County v. Thompson, 27 U. S. App. 715; 66 Fed. Rep. 92; Distilling & Cattle Feeding Co. v. Gottschalk Co., 24 U. S. App. 638; 66 Fed. Rep. 609; Adkins v. W. & J. Sloane, 19 U. S. App. 661; 61 Fed. Rep. 791; Burrows v. Niblack, 53 U. S. App. 712; 84 Fed. Rep. 111; Minchen v. Hart, 36 U. S. App. 534; 72 Fed. Rep. 294; Woodbury v. City of Shawneetown, 34 U. S. App. 655; 74 Fed. Rep. 205. On writ of error the findings of fact are binding on the appellate court (Jones v. McCormick Harvesting Co., 53 U. S. App. 408; 82 Fed. Rep. 295; Smiley v. Barker, 55 U. S. App. 125; 83 Fed. Rep. 684; Adkins v. W. & J. Sloane, 19 U. S. App. 661; 61 Fed. Rep. 791; Hardman v. Montana Union Ry. Co., 83 Fed. Rep. 88; Hoge v. Magnes, 56 U. S. 500; 85 Fed. Rep. 355; O'Hara v. Mobile & O. Ry. Co., 40 U. S. App. 471; 76 Fed. Rep. 718; Farwell v. Sturges, 9 U. S. App. 405; 56 Fed. Rep. 782.)

Verdict—When conclusive.—The sufficiency of the evidence to sustain the verdict is not reviewable in Federal appellate courts, unless defendant asked a peremptory instruction for a verdict in his favor at the close of the whole evidence (Pac. Mut. Life Ins. Co. v. Snowden, 12 U. S. App. 704; 58 Fed. Rep. 342; German Ins. Co. v. Frederick, 19 U. S. App. 24; 58 Fed. Rep. 144; City of Lincoln v. Sun Vapor St. Light Co., 19 U. S. App. 431; 59 Fed. Rep. 756; Chisholm v. Radford Brick Co., 24 U. S. App. 523; 65 Fed. Rep. 1; Terre Haute & I. R. Co. v. Mansberger, 28 U. S. App. 313; 65 Fed. Rep. 196; McCormick v. Falls City Bank, 9 U. S. App. 203; 57 Fed. Rep. 107; Great

Northern Ry. Co. v. McLaughlin, 44 U. S. App. 189; 70 Fed. Rep. 669). And even though a motion for a verdict be made and overruled or granted, the verdict of the jury will not be disturbed except clear error be shown (Carter Crume Co. v. Peurrung, U. S. App., 86 Fed. Rep. 439; Merwin v. Magone, 35 U. S. App. 741; 70 Fed. Rep. 776; Magone v. Origet, 35 U. S. App. 744; 70 Fed. Rep. 778; Gulf etc. Ry. Co. v. Ellis, 10 U. S. App. 640; 54 Fed. Rep. 481). When there is evidence to sustain a verdict an appellate court should not reverse the judgment thereon on the ground that the jury erred in the amount of their finding (Crosby Lumber Co. v. Smith, 3 U. S. App. 125; 51 Fed. Rep. 63; Morning Journal Assn. v. Rutherford, 1 U. S. App. 296; 51 Fed. Rep. 513). The record must disclose that the whole evidence is included in the bill of exceptions or the sufficiency of the evidence to sustain the verdict cannot be considered (National Masonic Assn. v. Shryock, 36 U. S. App. 658; 73 Fed. Rep. 774).

Harmless error.—An error committed by the trial court which is immaterial in view of the whole case, is not ground for reversal (McElwee v. Bridgeport Land & Imp. Co., 13 U. S. App. 195; 54 Fed. Rep. 627; Texas & Pac. R. R. Co. v. Nolan, 23 U. S. App. 443; 62 Fed. Rep. 552; Migeon v. Montana Cent. Ry. Co., 44 U. S. App. 724; 77 Fed. Rep. 249; Steiner v. Eppinger, 23 U. S. App. 344; 61 Fed. Rep. 253; Manufacturers' Accident etc. Co. v. Dorgan, 16 U. S. App. 290; 58 Fed. Rep. 945; Hudmon v. Cuyas, 13 U. S. App. 443; 57 Fed. Rep. 355; United States v. Patrick, 36 U. S. App. 645; 73 Fed. Rep. 800; United States v. Shapleigh, 12 U. S. App. 26; 54 Fed. Rep. 126). But it must clearly appear from the record that the error was harmless, or error in giving instructions must lead to reversal (Atchison T. & S. Fe R. Co. v. McClurg, 19 U. S. App. 346; 59 Fed. Rep. 860; National

Masonic Acc. Assn. v. Shryock, 36 U. S. App. 658; 73 Fed. Rep. 774).

§ 544 a. Cases tried by the circuit court without the intervention of a jury.—When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. (Rev. Stats. sec. 700.)

See ante, secs. 115, 116.

Special findings—Review of.—When there is a special finding of facts the appellate court will only consider whether upon such facts the judgment was correctly rendered (White v. Thacker, 41 U. S. App. 745; 78 Fed. Rep. 862; Randle v. Barnard, 53 U. S. App. 377; 81 Fed. Rep. 682; Walker v. Miller, 19 U. S. App. 403; 59 Fed. Rep. 869; Insurance Co. v. International Trust Co., 36 U. S. App. 291; 71 Fed. Rep. 88; Wesson v. Saline County, 34 U. S. App. 680; 73 Fed. Rep. 917; Blanchard v. Commercial Bank, 44 U. S. App. 456; 75 Fed. Rep. 249). When a jury is waived in the circuit court, a party wishing to raise any question of law upon the merits in the court above should request special findings of fact framed like the verdict of a jury and reserve his exceptions to those special findings

if he deem them not sustained by the evidence (Humphreys v. Third Nat. Bank, 43 U. S. App. 698; 75 Fed. Rep. 852; Mercantile Trust Co. v. Wood, 19 U. S. App. 567; 60 Fed. Rep. 346). If finding of the facts is special it should be set forth on the record in the nature of a special verdict. (Hyde v. Booraem, 16 Peters, 169; U. S. v. King, 7 How. 833; Weems v. George, 13 How. 190; see Parsons v. Armor, 3 Peters, 413.) If there is a special finding, the evidence will not be examined to see whether the finding is right. (Saulet v. Shepherd, 4 Wall. 502; Copelin v. Ins. Co., 9 Wall. 461; Insurance Co. v. Folsom, 18 Wall. 237; Insurance Co. v. Sea, 21 Wall. 158; U. S. v. Dawson, 101 U. S. 569; Tyng v. Grinnell, 92 U. S. 467.) The review extends to the sufficiency of the facts found to support the judgment. (Tyng v. Grinnell, 92 U. S. 467.) If not sufficient to support the judgment, the case may be remanded for trial on other issues involved therein. (Ex parte French, 91 U. S. 423.) If there is no special finding of facts, the supreme court cannot examine the evidence to determine whether it is sufficient to support the judgment. (Norris v. Jackson, 9 Wall. 125; Generes v. Campbell, 11 Wall. 193; Miller v. Life Ins. Co., 12 Wall. 285; Richmond v. Smith, 15 Wall. 429; Dickinson v. Planters' Bank, 16 Wall. 250; Ohio v. Marcy, 18 Wall. 552; Farrell v. U. S., 99 U. S. 221; Miller v. Houston City St. Ry. Co., 13 U. S. App. 57; 55 Fed. Rep. 366.) If there is no error in making up the findings of fact, the judgment may be reversed and a new trial awarded. (Flanders v. Tweed, 9 Wall. 425.)

Trial by the court.—Where a party is present and goes to trial before the court without objection, he will be deemed to have waived a jury trial (Phillips v. Preston, 5 How. 278; Gilman v. Illinois & M. Tel. Co., 91 U. S. 603); but if there is nothing to show

that he or his counsel were present, it is error for the court to try the issues without a jury. (Kearney v. Case, 12 Wall. 275.) If the record shows a waiver of a jury trial, but not that such waiver was in writing, it is sufficient to support the judgment but not to authorize a review of the rulings. (Kearney v. Case, 12 Wall. 275.) A recital in the record that a jury is waived is conclusive of an agreement to waive it. (Fleitas v. Cockran, 101 U. S. 301.) A statement of facts filed after judgment is no evidence of a waiver. (Flanders v. Tweed, 9 Wall. 425.) If the record does not show a waiver, judgment may be reversed and the case remanded. (Flanders v. Tweed, 9 Wall. 425.) Rulings at the trial of an action at law, without a jury, when there had been no waiver of a jury by stipulation in writing signed by the parties or their attorneys, and filed with the clerk, are not reviewable under this section. (Bond v. Dustin, 112 U. S. 604; Paine v. Cent. Vt. Railroad, 118 U. S. 152; Dundee Mortgage Co. v. Hughes, 124 U. S. 157; Roberts v. Benjamin, 124 U. S. 64.)

Rulings.—If the case was tried by the court, the improper rejection of evidence is a proper subject for a bill of exceptions (Arthurs v. Hart, 17 How. 6); but if the testimony is cumulative, judgment will not be reversed if it could not have influenced the result. (Arthurs v. Hart, 17 How. 6.) So the admission of immaterial evidence is no sufficient reason for reversing a judgment when it would not have injuriously affected the party objecting. (Mining Co. v. Taylor, 100 U. S. 37.) The ruling on admission of evidence must be properly excepted to. (Tyng v. Grinnell, 92 U. S. 467; Weems v. George, 13 How. 190; Campbell v. Boyreau, 21 How. 223; see Field v. U. S., 9 Peters, 182.) If the judge refuses an instruction at the close of plaintiff's case that the evidence is not sufficient to entitle plaintiff to recover, the

ruling is subject to review (Insurance Co. v. Folsom, 18 Wall. 237; Folsom v. Mercantile Ins. Co., 9 Blatchf. 201; Fed. Cas. No. 4903); but the rulings of the judge on prayers for instructions to submit to the jury cannot be reviewed. (Dirst v. Morris, 14 Wall. 484; Crews v. Brewer, 19 Wall. 70; Cooper v. Omohundro, 19 Wall. 65; see Miller v. Life Ins. Co., 12 Wall. 285.) A refusal to grant a new trial is not subject to review, as the granting or refusing is in the discretion of the court (Cooper v. Omohundro, 19 Wall. 65); so of the allowance of time for the production of further evidence (Gilman v. Illinois & M. Tel. Co., 91 U. S. 603); or a ruling on motion to strike out a judgment entered on the pleadings. (Cheang Kee v. U. S., 3 Wall. 320.)

Findings.—The court under this section may determine, as in case of a special verdict, whether the facts in the agreed statement are sufficient to sustain the judgment, although the finding of the circuit court was in form general. (Supervisors v. Kennicott, 103 U. S. 554.) The findings of the court are conclusive. (Davis v. Fredericks, 104 U. S. 618.) In cases of trials not by jury, a statement of facts is necessary to enable this court to review the decision of the court below. (Bonnifield v. Price, 4 Morr. Trans. 357.) Where the finding is general, no question of law is subject to review except those growing out of the rulings. (Dirst v. Morris, 14 Wall. 484; Insurance Co. v. Folsom, 18 Wall. 237; Cooper v. Omohundro, 19 Wall. 65; Crews v. Brewer, 19 Wall. 70.) If the judge finds the facts, and then proceeds to deduce therefrom another fact, the conclusion may be revised. (French v. Edwards, 21 Wall. 147.) A statement of facts signed by counsel cannot be deemed a finding of facts. (Bethel v. Matthews, 13 Wall. 1; Kearney v. Case, 12 Wall. 275.) An opinion reciting some evidence, and stating evidence instead of facts found,

is not a statement of facts (Insurance Co. v. Tweed, 7 Wall. 44); and a statement or opinion filed after entry of judgment cannot be regarded (Flanders v. Tweed, 9 Wall. 425; United States v. King, 7 How. 833; see McGavock v. Woodlief, 20 How. 221); so, a mere report of the evidence is not a sufficient statement of facts (Crews v. Brewer, 19 Wall. 70); and a statement filed without consent of the parties after issue and service of the writ of error cannot be regarded. (Generes v. Bonnemer, 7 Wall. 564; Avendano v. Gay, 8 Wall. 376.) When the cause is tried by the court without a jury, judgment will be affirmed if there is neither a special verdict nor an agreed statement of facts, nor a bill of exceptions to rulings. (Minor v. Tillotson, 2 How. 392; Prentice v. Zane, 8 How. 470; Guild v. Frontin, 18 How. 135; Kelsey v. Forsyth, 21 How. 85; Lawler v. Claflin, 22 How. 23; New Orleans v. Gaines, 22 How. 141; Gilman v. Illinois & M. Tel. Co., 91 U. S. 603.) The decision of the circuit court on the weight of evidence is conclusive. (Bond v. Brown, 12 How. 254.)

Exceptions to be taken.—An objection to the admission or exclusion of evidence or to the ruling on propositions of law must appear by bill of exceptions (Norris v. Jackson, 9 Wall. 125); so where the objection is that the evidence was not sufficient to justify the finding. (Cucullu v. Emmerling, 22 How. 83.) If the verdict is general, only such rulings can be reviewed as are presented by bill (Norris v. Jackson, 9 Wall. 125; Miller v. Life Ins. Co., 12 Wall. 285); and the bill of exceptions cannot be used to bring up the whole testimony for review (Dirst v. Morris, 14 Wall. 484; see Coddington v. Richardson, 10 Wall. 516); but whether the finding is general or special, the rulings, if excepted to, may be reviewed (Miller v. Life Ins. Co., 12 Wall. 285); and no bill of exceptions is necessary to bring up on the record the

findings, whether general or special (Insurance Co. v. Boon, 95 U. S. 117.) The mere fact that other evidence was given besides what is found in the bill of exceptions is no objection to the examination of the question of law presented by it. (Arthurs v. Hart, 17 How. 6.) A general exception to a special finding is not sufficient (Insurance Co. v. Sea, 21 Wall. 158); and no exception can be taken to a refusal to make a special finding. (Insurance Co. v. Folsom, 18 Wall. 237.) Exceptions to rulings of the court must be taken at the time. (Nickerson v. Steamship Co., 4 Morr. Trans. 360.) The court refuses to consider errors assigned on a mere motion for a new trial, and not made part of the record by bill of exceptions. (Levy v. Danzel, 3 Morr. Trans. 115.) Alleged errors not brought to the attention of the inferior court cannot be considered. (Davis v. Fredericks, 104 U. S. 618.) Where no bill of exceptions is taken, this court cannot consider the validity of an order setting aside a nonsuit. (Loring v. Frue, 3 Morr. Trans. 174.) Bills of exceptions must embody the evidence, or refer to the evidence contained in other parts of the record. (Jones v. Buckell, 3 Morr. Trans. 555.) A prayer for instructions presented as a whole is properly refused if any of them is erroneous. (U. S. v. Hough, 103 U. S. 71.) It is error to instruct touching the law applicable to facts not supported by evidence. (Jones v. Van Benthuysen, 103 U. S. 87.) Where the bill of exceptions sets forth all the facts, the judgment will not be reversed, because a peremptory instruction was given to return a verdict in favor of the plaintiff. (Arthur v. Jacoby, 103 U. S. 677.) A verdict in assumpsit is amendable, and judgment may be rendered thereon for the damages thereby caused. (Miles v. U. S., 103 U. S. 304.) An amended bill filed without leave eight years after a bill in equity had been filed will be disregarded on

appeal. (Terry v. McClure, 103 U. S. 442.) An order made by the court below by consent of parties is binding on them on appeal. (Water Works Co. v. Barrett, 103 U. S. 516.) A cause not entitled to precedence will not, over objections, be advanced in order to be heard before another case on the docket. (Louisiana v. New Orleans, 103 U. S. 521.) Where the only question presented arises on the finding of facts, the appeal will be dismissed. (Nickerson v. Merchants' S. Co., 12 Fed. Rep. 352, note.)

§ 545. **Appeals from circuit courts to supreme court.**—Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error. (Rev. Stats. sec. 1012.)

Appeal, rules, and regulations.—The supreme court has no power to receive an appeal in any other mode than that provided by law (Villabolos v. United States, 6 How. 81; United States v. Moore, 11 Fed. Rep. 248), nor to dispense with or change the law. (United States v. Curry, 6 How. 106.) The rules, regulations and restrictions as to time within which the writ of error may be brought, and when it shall operate as a supersedeas, the citation, the security to be given, and the restrictions upon the appellate court as to reversal are all applicable. (The San Pedro, 2 Wheat. 132.) The law does not require an appeal to be made in open court; it may be made in vacation, and the form in which it is taken is immaterial. (Hudgins v. Kemp, 18 How. 530.) An entry on the minutes is not necessary; the certificate of the clerk to the facts is all that is required. (Hudgins v. Kemp, 18 How. 530.) And where an appeal bond is filed, the record may be amended nunc pro tunc to

show an appeal taken. (Nicholson v. Chicago, 5 Biss. 89; Fed. Cas. No. 10248.) Appeals entered at the succeeding term will be dismissed. (In re McEwen, 9 Biss. 368.) A cross-appeal must be prosecuted like any other appeal. (Wenslow v. Wilcox, 4 Morr. Trans. 394.) If the decree is joint all the defendants must join, unless there is a severance (Owings v. Kincannon, 7 Peters, 399; Mussina v. Cavazos, 20 How. 280; Masterson v. Herndon, 10 Wall. 416); but one of them may prosecute, although the others abandon it (Todd v. Daniel, 16 Peters, 521); and any one holding a distinct interest may appeal. (Forgay v. Conrad, 6 How. 201.) An appeal or supersedeas does not oust the jurisdiction of the lower court or preclude collateral or independent proceedings. (Fidelity Trust & S. D. Co. v. Mobile St. Ry. Co., 54 Fed. Rep. 26.)

Application and allowance.—An appeal is a matter of right, and no petition is necessary. (United States v. Curry, 6 How. 106.) A petition praying for an appeal does not operate to remove the cause, unless accompanied by an allowance of the appeal by the court (Yeaton v. Lenox, 7 Pet. 220; Barrell v. Transportation Co., 3 Wall. 424; Pierce v. Cox, 9 Wall. 786); and if no appeal lies the court may refuse to allow it (San Francisco v. United States, 4 Saw. 553; Fed. Cas. No. 12316); but when allowed the circuit court cannot afterward set aside the order allowing it. (McGarrahan v. The New Idria Min. Co., 49 Cal. 331.) Whoever can sign a citation may allow the appeal. (Sage v. Railroad Co., 96 U. S. 712.) The order allowing an appeal may at the request of appellant be set aside at any time during the term. (Goddard v. Ordway, 101 U. S. 745.) There is no provision in the statute for the form of allowance; the acceptance of security followed, when necessary, by the signing of a citation is in legal effect an allowance of the appeal.

(Sage v. Railroad Co., 96 U. S. 712; Brandies v. Cochrane, 105 U. S. 262; S. C. 13 Fed. Rep. 142.) Where the claim and bond were sufficient a motion to dismiss will be denied (Scruggs v. Viser, 13 Fed. Rep. 304, note); and it may be inferred that the appeal was allowed, although the allowance does not appear on the record (Railroad Co. v. Bradleys, 7 Wall. 575); but the mere approval of the bond during the term is not sufficient. (Vansant v. Gaslight Co., 99 U. S. 213.) If allowed in open court during the term the allowance should be entered on the minutes. (Vansant v. Gaslight Co., 99 U. S. 213.)

The citation.—A citation to the opposite party to appear is necessary (Villabolos v. United States, 6 How. 81; United States v. Curry, 6 How. 106; Garrison v. Cass Co., 5 Wall. 823; Alviso v. United States, 5 Wall. 824; Railroad Co. v. Blair, 100 U. S. 661; Jacobs v. George, 150 U. S. 415; Peace River Phosphate Co. v. Edwards, 30 U. S. App. 513; 70 Fed. Rep. 728; West v. Irwin, 9 U. S. App. 547; 54 Fed. Rep. 419); but if an appeal is taken in open court at the same term at which the decree is entered, no citation is necessary (Reily v. Lamar, 2 Cranch, 344; The San Pedro, 2 Wheat. 132; Yeaton v. Lenox, 7 Pet. 220; Brockett v. Brockett, 2 How. 238; Villabolos v. United States, 6 How. 81; United States v. Vigil, 10 Wall. 423; Milner v. Meek, 95 U. S. 252; Jacobs v. George, 150 U. S. 415; Central Trust Co. v. Continental T. Co., U. S. App., 86 Fed. Rep. 517); but the record must show the appeal was allowed in open court (Vansant v. Gaslight Co., 99 U. S. 213); a citation should issue though the security is not taken till after the term (National Bank v. Omaha, 96 U. S. 737); and if the record shows that appellee had notice, the citation is not indispensable, although the appeal is taken at a subsequent term. (United States v. Gomez, 1 Wall. 690.) A defect in the return day of a citation

on appeal is not jurisdictional, and a new citation may be taken out if necessary. (Shute v. Keyser, 149 U. S. 649.) A citation should issue where the appeal is allowed at the term, but not perfected until after the term. (Jacobs v. George, 150 U. S. 415.) A general acceptance of service of citation by an attorney is good for all the parties whom he represents of record. (Andrews v. National Foundry & P. Works, 46 U. S. App. 619; 77 Fed. Rep. 774.) The citation may issue, properly returnable even after the expiration of the time for taking the appeal has elapsed. (Jacobs v. George, 150 U. S. 415.)

Facts reviewable in appealed cases.—In appeals in equity cases findings of fact made by the court below are not binding on the appellate court. The whole case is before the latter court. (Waterloo Min. Co. v. Doe, 48 U. S. App. 411; 82 Fed. Rep. 45.) But the findings are of weight. (Latta v. Granger, 32 U. S. App. 342; 68 Fed. Rep. 69; Mann v. Keene G. Sav. Bank, U. S. App., 86 Fed. Rep. 51; Metropolitan Bank v. Rogers, 3 U. S. App. 406; 53 Fed. Rep. 776.) When a circuit court has sustained the finding of a district court on conflicting evidence in an admiralty case, the circuit court of appeals will not reverse the findings below. (The S. S. Wilhelm, 16 U. S. App. 356; 59 Fed. Rep. 169; The Rabboni, 53 Fed. Rep. 952; The Royal, 14 U. S. App. 30; 54 Fed. Rep. 204.)

Second appeal.—If an appeal is dismissed for some informality the party may take a second appeal within the period allowed for an appeal (Yeaton v. Lenox, 8 Pet. 123; The Virginia v. West, 19 How. 182; United States v. Pacheco, 20 How. 261; Edmondson v. Bloomshire, 7 Wall. 306); but an order allowing a party to perfect an appeal is not the allowance of a second appeal. (United States v. Curry, 6 How. 106; Ed-

mondson v. Bloomshire, 7 Wall. 306.) Second appeals are allowed to bring up proceedings subsequent to the mandate issued on a former appeal and not settled by the terms of the mandate (Hinckley v. Morton, 103 U. S. 764); but where the decree was entered in exact accordance with the mandate, an appeal from the decree will be dismissed. (Humphrey v. Baker, 103 U. S. 736.) A party who has appealed, but whose appeal has been dismissed, can only be heard in support of the decree. (Loudon v. Taxing District, 104 U. S. 771.) If a copy of the transcript is not filed at the term next succeeding the appeal, a citation issued after that time without a second appeal is null. (Castro v. United States, 3 Wall. 46.)

§ 546. **Where both parties appeal to the supreme court, one record sufficient.**—Where appeal is duly taken by both parties from the judgment or decree of a circuit or district court to the supreme court, a transcript of the record filed in the supreme court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases. (Rev. Stats. sec. 1013.)

CHAPTER XXII.

CRIMINAL PROCEDURE.

§ 547. Offenders against the United States, how arrested, and how removed for trial.
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§ 547. Offenders against the United States, how arrested and removed for trial.—For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense

of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had. [See sec. 879.] (Rev. Stats. sec. 1014.)

Note.—Section recited and referred to in United States v. Jones, 134 U. S. 483. All the regulations and steps incident to a proceeding before the United States commissioner from its commencement to its close are guided by the State laws so far as they may be applicable to the Federal courts, if no rule upon the same subject has been prescribed by the Federal statutes (U. S. v. Sauer, 73 Fed. Rep. 671). The purpose of the words "agreeably to the usual mode of process against offenders in such State" was to assimilate all the proceedings for holding accused persons to answer before a court of the United States to those for similar purposes under the laws of the State where the proceeding should take place (United States v. Dunbar, 83 Fed. Rep. 151). The United States courts are governed in the administration of the criminal law by the rules of the common law (Howard v. United States, 43 U. S. App. 678; 75 Fed. Rep. 986); but there are no common law offenses against the United States (In re Greene, 52 Fed. Rep. 104).

Authority of magistrates.—The power conferred by this section is common to any judge or justice of the peace (Ex parte, Gist, 26 Ala. 156; Bagnall v. Ableman, 4 Wis. 163); and a commissioner has all the powers of a justice of the peace or State magistrate in the arrest and commitment of offenders against United States laws (Ex parte Kaine, 10 N. Y. Leg. Obs. 257; Fed. Cas. No. 7598.) A district attorney has no authority to order the marshal not to execute a warrant issued by a commissioner. (U. S. v. Scroggins, 3 Woods, 529; Fed. Cas. No. 16244.) It is to be exercised according to such form and manner as the judge may see fit to adopt, agreeably to the usual mode adopted in the State. (Bagnall v. Ableman, 4 Wis. 163.) It was the intention to assimilate all proceedings for holding accused persons to answer for crime to the proceedings had for similar offenses in the State courts. (U. S. v. Harden, 10 Fed. Rep. 803; 4 Hughes, 455; U. S. v. Rundlett, 2 Curt. 41; Fed. Cas. No. 16208; U. S. v. Horton's Securities 2 Dill. 94; Fed. Cas. No. 15393; United States v. Dunbar, 83 Fed. Rep. 151.) The term "mode of process" is synonymous with mode of proceeding, and includes the power to admit to bail. (U. S. v. Rundlett, 2 Curt. 41; Fed. Cas. No. 16208.) When a judge sits to hear a criminal charge and commit for trial, he acts as a judge and not as a court. (U. S. v. Clarke, 1 Gall. 497; Fed. Cas. No. 14804; United States v. Hughes, 70 Fed. Rep. 972.) The authority of a United States commissioner to take bail for the appearance of an accused person to answer further depends upon the laws of the State giving authority to examining magistrate (United States v. Sauer, 73 Fed. Rep. 671). United States commissioners have no authority to pass upon the credibility of testimony, or to find any fact (United States v. Hughes, 70 Fed. Rep. 972). Commissioners

have the same power to take bail upon an arrest made after an indictment as they have in cases of arrest before indictment (Hoeffner v. United States, 87 Fed. Rep. 185). A charge of perjury cannot be predicated upon an oath administered by a commissioner in taking bail in a criminal case in a State where the State laws do not authorize justices of the peace to administer oaths for similar purposes (United State v. Garcelon, 82 Fed. Rep. 611).

Issuance of warrant.—It is the duty of the magistrate to award a warrant whenever complaint is made to him on oath that a crime has been committed, whether applied for by the district attorney or any other person (U. S. v. Skinner, 2 Wheel. C. C. 232; Fed. Cas. No. 16309); but the oath of the complainant is necessary (U. S. v. Mackenzie, 1 N. Y. Leg. Obs. 227; Fed. Cas. No. 15690); and the party who makes the oath must have personal knowledge of the commission of the offense (U. S. v. Burr, 2 Wheel. C. C. 573; Fed. Cas. No. 14692; In re Commissioners, 3 Woods, 502; Fed. Cas. No. 12126); but a court may issue a warrant upon probable cause supported by oath. (U. S. v. Bollman, 1 Cranch C. C. 373; Fed. Cas. No. 14622); but not upon a complaint made upon information and belief only (United States v. Collins, 79 Fed. Rep. 65). If the signature of a magistrate is in pencil the warrant is void. (U. S. v. Thompson, 2 Cranch C. C. 409; Fed. Cas. No. 16484.) A warrant will not issue to arrest an officer while his conduct is under investigation by a naval court of inquiry regularly organized. (U. S. v. Mackenzie, 1 N. Y. Leg. Obs. 227; Fed. Cas. No. 15690.) A party arrested in a civil action for damages for conversion, who is already held to bail on criminal charges growing out of the same transaction is entitled to a reduction in the amount of bail. (Smith v. Lee, 13 Fed. Rep. 28.) As to arrest in

civil actions, see U. S. v. Griswold, 11 Fed. Rep. 807; S. C., 6 Saw. 255. When a crime has been committed by a corporation the court obtains jurisdiction over it, in the absence of statutory provision, by any appropriate writ for that purpose (United States v. John Kelso Co., 86 Fed. Rep. 304).

Preliminary proceedings.—A magistrate is not generally bound to investigate charges known to the district attorney, and which he declines to prosecute. (U. S. v. Mackenzie, 1 N. Y. Leg. Obs. 227; Fed. Cas. No. 15690.) A marshal who has arrested a person may take him before a justice of the peace to be admitted to bail (U. S. v. Milburn, 4 Cranch C. C. 478; Fed. Cas. No. 15765); and a commitment for examination should not exceed twenty-four hours unless special cause is shown, except at the request of the accused. (U. S. v. Worms, 4 Blatchf. 332; Fed. Cas. No. 16765.) A commissioner has no authority to bail the offender if the State magistrates have no power (U. S. v. Case, 8 Blatchf. 250; Fed. Cas. No. 14742; U. S. v. Sauer 73 Fed. Rep. 671); but otherwise, if the State magistrates have such power (U. S. v. Rundlett, 2 Curt. 41; Fed. Cas. No. 16208; U. S. v. Horton's Securities, 2 Dill. 94; Fed. Cas. No. 15393.) The material parts of a recognizance to appear, and of its condition, should be set forth in the body of it so as to admit of extension consistently with its terms (Dillingham v. U. S., 2 Wash. C. C. 422; Fed. Cas. No. 3913.) And it is essential that the party recognized to appear should be solemnly warned to appear before default is entered. (Dillingham v. U. S., 2 Wash. C. C. 422; Fed. Cas. No. 3913.) A commissioner may order an adjournment to a more convenient place, and this power includes adjournments as to time and place (U. S. v. Rundlett, 2 Curt. 41; Fed. Cas. No. 16208); and if the accused is under bail to appear at an adjourned day, second adjourn-

ment cannot be made until he appears or is legally put in default. (U. S. v. Rundlett, 2 Curt. 41; Fed. Cas. No. 16208.) An arrest for trial may be made, to be followed by imprisonment if no bail is taken, or by bail, though punishment may be by fine alone (In re Jackson, 14 Blatchf. 245; Fed. Cas. No. 7124.) This section does not apply to an arrest made for the purpose of extradition. (In re Henrich, 5 Blatchf. 414; Fed. Cas. No. 6369.) A Chinese person who is otherwise entitled to remain in the United States, cannot be deported for his refusal to be sworn to testify (Ex parte Sing, 82 Fed. Rep. 22).

Preliminary examination.—A commissioner for the purposes of a preliminary examination has only the power and authority of a committing magistrate, and he must proceed "agreeably to the usual mode of process against offenders" before State magistrates (In re Martin, 5 Blatchf. 303; Fed. Cas. No. 9151); and he may be directed to certify the proceedings into the court, that it may be there considered (U. S. v. Berry, 4 Fed. Rep. 779; 2 McCrary, 58); and if the magistrate takes money from the person of the accused, a summary order for its return may issue from the court. (Ex parte Craig, 4 Wash. C. C. 710; Fed. Cas. No. 3321.) The accused may at the hearing be represented by counsel. (U. S. v. Bollman, 1 Cranch C. C. 373; Fed. Cas. No. 14622.) Witness for the accused present at the commission of the offense may be examined to explain what is said by the witnesses for the prosecution (U. S. v. White, 2 Wash. C. C. 29; Fed. Cas. No. 16685); but a magistrate cannot issue process into another State to summon witnesses for the accused. (U. S. v. White, 2 Wash. C. C. 29; Fed. Cas. No. 16685.) The district attorney may appear to attend to the presentation of evidence, as counsel for the government, and he cannot dismiss the proceedings. (U. S. v. Schumann, 7 Sawy.

439; 2 Abb. C. C. 523; Fed. Cas. No. 16235.) Witnesses for the prosecution cannot be examined (U. S. v. White, 2 Wash. C. C. 29; Fed. Cas. No. 16685; U. S. v. Burr, 1 Burr's Trial, 177). Witnesses for accused are not generally examined on an application to bind him over to answer a criminal charge. (U. S. v. White, 2 Wash. C. C. 29; Fed. Cas. No. 16685.) The preliminary examination is to take place in the district where the offender is found without regard to where the offense was committed (Anonymous, 1 Woolw. 422; Fed. Cas No. 730); and the prisoner should be brought before the officer to establish his identity, as the finding in another district established nothing as to his identity. (Anonymous, 1 Woolw. 422; Fed. Cas. No. 730; Bagnall v. Ableman, 4 Wis. 163.)

Commitment.—If the indictment contains inconsistent allegations and charges an impossible crime, the accused will be discharged (U. S. v. Pope, 24 Int. Rev. Rec. 29; Fed. Cas. No. 16069); but if discharged he may be again arrested. The action of the commissioner is not final as to the commitment or discharge of the prisoner. (In re Martin, 5 Blatchf. 303; Fed. Cas. No. 9151; U. S. v. Burr, 1 Burr's Trial, 79.) A certified copy of an information which was not filed upon cause shown is not sufficient evidence to justify a commitment. (U. S. v. Shepard, 1 Abb. C. C. 431; Fed. Cas. No. 16273.) The presence of witnesses ought to be obtained. (U. S. v. Burr, 1 Burr's Trial, 97.) An affidavit made before one commissioner is admissible before another. (Ex parte Bollman, 4 Cranch, 75; S. C., 1 Cranch C. C. 373; Fed. Cas. No. 14622; U. S. v. Burr, 1 Burr's Trial, 97.) The court may commit the prisoner for trial although the grand jury is in session and the order does not cease on the assembling of the grand jury. (U. S. v. Burr, 1 Burr's Trial, 97.) If the sessions of the

court are interrupted by rebellion, the prisoner cannot be committed for an indefinite time. (U. S. v. Greiner, 4 Phila. 396; Fed. Cas. No. 15262.) To warrant a commitment the fact of the commission of an offense may be proved by the confession of the prisoner. (U. S. v. Bloomgart, 2 Ben. 356; Fed. Cas. No. 14612.) Probable cause must be shown to justify a commitment, and probable cause must be made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged. (In re Martin, 5 Blatchf. 303; Fed. Cas. No. 9151; U. S. v. Lumsden, 1 Bond, 5; Fed. Cas. No. 15641; U. S. v. Burr, 1 Burr's Trial, 11; In re Van Campen, 2 Ben. 419; Fed. Cas. No. 16835.) And a certified copy of an indictment, if uncontradicted, is sufficient proof of probable cause (In re Clark, 2 Ben. 540; Fed. Cas. No. 2797; In re Alexander, 1 Low. 530; Fed. Cas. No. 162; U. S. v. Haskins, 3 Sawy. 262; Fed. Cas. No. 15322.) Although the indictment is quashed the court may commit to await a new indictment. (U. S. v. To-wan-ga-ca, Hemp. 299; Fed. Cas. No. 16533 a.)

Warrant of commitment.—A warrant of commitment must be under seal (Ex parte Sprout, 1 Cranch C. C. 424; Fed. Cas. No. 13267; Ex parte Bennett, 2 Cranch C. C. 612; Fed. Cas. No. 1311); but if a commissioner has no seal and is not required to keep one a warrant is not void for omission of a seal (Starr v. United States, 153 U.S. 614); it must show sufficient cause on its face (Ex parte Bennett, 2 Cranch C. C. 612; Fed. Cas. No. 1311; U. S. v. Brown, 4 Cranch C. C. 333; Fed. Cas. No. 14659; Ex parte Williams, 4 Cranch C. C. 343), and must state some good cause certain supported by oath (Ex parte Buford, 1 Cranch C. C. 276; Fed. Cas. No. 2148; S. C., 3 Cranch, 448; Ex parte Sprout, 1 Cranch C. C. 424; Ex parte Bennett, 2 Cranch C. C. 612; Fed. Cas. No. 1311); and

fix the time for imprisonment. (Ex parte Sprout, 1 Cranch C. C. 424; Fed. Cas. No. 13267.) A commitment written on the back of the warrant is not sufficient unless it charges a crime. (U. S. v. Brown, 4 Cranch C. C. 333; Fed. Cas. No. 14659.) The marshal is liable in a case where the judge had no jurisdiction or authority to issue the same. (Bagnall v. Ableman, 4 Wis. 163.) It is an offense to obstruct, oppose, or resist the United States marshal while executing or attempting to execute any lawful writ or process. (U. S. v. Doyle, 6 Saw. 612; 5 Fed. Rep. 680.)

Removal of prisoner to another district.—An offender against the laws of the United States may be removed into a district in a territory as well as in a State. (United States v. Haskins, 3 Saw. 262; Fed. Cas. No. 15322.) So a party arrested elsewhere may be removed into the district of Columbia for trial. (In re Buell, 3 Dill. 116; Fed. Cas. No. 2102; In re Price, 83 Fed. Rep. 830.) A warrant for removal is authorized only where the offender has been arrested and committed for want of bail. (United States v. Shepard, 1 Abb. U. S. 431; Fed. Cas. No. 16273.) He has a right to an examination, and to be let to bail. (Bagnall v. Ableman, 4 Wis. 163.) A removal cannot be had where there has been neither an indictment nor an examination before a commissioner in either district, involving an inquiry as to the alleged crime. (United States v. Carlin, 85 Fed. Rep. 963.) The indictment must be considered sufficient unless so defective that it would be the manifest duty of the court to decline to take jurisdiction (In re Clark, 2 Ben. 540; Fed. Cas. No. 2797); but a mere copy of the indictment is not sufficient if not sufficient under the State law. (Bagnall v. Ableman, 4 Wis. 163.) If it does not charge an offense triable in the district to which it is sought to be removed the judge may refuse to issue the warrant. (In re Buell, 3 Dill. 116; Fed. Cas. No.

2102.) If it appears from the indictment that the court has no jurisdiction of the offense the defendant should be discharged. (United States v. Lee, 84 Fed. Rep. 626; In re Corning, 51 Fed. Rep. 205; Horner v. United States, 143 U. S. 207.) Whether the indictment shows an offense may be examined into on application for the warrant of removal (Ex parte Buell, 3 Dill. 116; Fed. Cas. No. 2102), and if the prisoner is in custody of the marshal, he cannot be removed into the other district, although there charged with a higher offense. (United States v. Burr, 2 Burr's Trial, 454; United States v. Corrie, 23 Law. Rep. 145; Fed. Cas. No. 14869.) Where it appears that the act alleged does not constitute an offense against the United States, or that no trial can be had in the district to which the removal is sought, it is the duty of the judge to refuse the warrant. (In re Doig, 4 Fed. Rep. 193; In re Buell, 3 Dill. 116; Fed. Cas. No. 2102; In re Clark, 2 Ben. 540; Fed. Cas. No. 2797.) A prisoner in custody of a marshal is entitled to notice of removal and an opportunity to present to the judge any objections he may have to such removal. (In re Beshears, 79 Fed. Rep. 70.) The power to order a removal rests on the judge, and the words "judge of the district" may be held to include any judge of the district. (Anon., 1 Woolw. 422; Fed. Cas. No. 730; United States v. Burr, 2 Burr's Trial, 451.) The judge of the district to whom application is made may review without a writ a habeas corpus the action of the committing magistrate, and may reduce the bill required by him. (United States v. Brawner, 7 Fed. Rep. 87.) Under this section, the judge of the United States district court is invested with plenary power to grant or refuse a warrant of removal of a party arrested and committed for crime for trial in another district. (United States v. Rogers, 23 Fed. Rep. 658.) The court has not only the right, but the duty, to look into the indictment so far as to be satisfied that an

offense against the United States is charged, and that it is such an offense as may be lawfully tried in the forum to which the removal is asked. (United States v. Horner, 44 Fed. Rep. 677.) As to the practice of removal in the southern district of New York, see United States v. Price, 84 Fed. Rep. 636. Where all the acts constituting the offense were committed on the high seas, the accused must be tried in the district where he was arrested and should not be removed. (United States v. Hughes, 70 Fed. Rep. 972.) The question of the identity of the offender is a question of fact which the United States commissioner has full jurisdiction to decide for the purpose of removal. (Horner v. United States, 143 U. S. 207.) A warrant of removal which directs the marshal to remove the offender to another district, "to be tried in said district upon such counts in the indictment now pending in said district as he can be legally tried upon," is sufficient. (Horner v. United States, 143 U. S. 207.) Judges of the district courts have no power to cause the arrest of a citizen of a State, to be there imprisoned until he obeys an order made in a civil case pending in the United States courts in that State. (In re Graves, 129 Fed. Rep. 60.

§ 548. Bail admitted in cases not capital.—Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders. (Rev. Stats. sec. 1015.)

Bail.—The court cannot grant the right to give bail without authority to do so by law. (United States v. Hudson, 65 Fed. Rep. 68.) "Bail" means security taken for the appearance of the party accused at the

time and place of trial (United States v. Case, 8 Blatchf. 250; Fed. Cas. No. 14742), and money cannot be taken in lieu thereof. (United States v. Case, 8 Blatchf. 250; Fed. Cas. No. 14742.) To require a larger bail than the prisoner can give is to require excessive bail, and to deny bail. (United States v. Lawrence, 4 Cranch C. C. 518; Fed. Cas. No. 15577.) The discretion of the magistrate must be guided by the consideration of the ability of the prisoner to give bail, and of the atrocity of the crime. (United States v. Lawrence, 4 Cranch C. C. 518; Fed. Cas. No. 15577.) If the offense is indictable a corrupt motive cannot be imputed to the magistrate on account of the smallness of the bail. (United States v. Smith 4 Cranch C. C. 727; Fed. Cas. No. 16330.) Under this section bail may be admitted by a circuit court commissioner upon all arrests in criminal cases where the offense is not punishable by death. (United States v. Jones, 134 U. S. 483.) The Oregon statute limiting the power to give bail upon an appeal to the judge where the judgment was given does not impair the power of any officer designated by the United States' statute to admit a defendant to bail after indictment and before trial. (United States v. Dunbar, 83 Fed. Rep. 151.) The undertaking need not recite that defendant has been admitted to bail or the number of the section of Revised Statutes, alleged to have been violated. (United States v. Dunbar, 83 Fed. Rep. 151.) No request to the sureties is required to produce a prisoner except that duly given in open court at the time regularly set down for trial. (United States v. Dunbar, 83 Fed. Rep. 158.) The bail bond is not void if taken in pursuance of an order of a commissioner though the information charge no offense. (Hardy v. United States, 36 U. S. App. 225; 71 Fed. Rep. 158.) The form of a bail bond taken by a United States commissioner should conform in all substantial particu-

lars to the requirements of the law of the State in which the commissioner is sitting. (United States v. Sauer, 73 Fed. Rep. 671.) In enforcing a forfeited bond taken in a criminal case, the United States is not restricted to the remedies provided by the laws of the State (United States v. Insley, 12 U. S. App. 125; 54 Fed. Rep. 221.)

Admission to bail.—If a prisoner is sick, and his disease is such that confinement must be injurious and may be fatal he may be admitted to bail (United States v. Jones, 3 Wash. C. C. 224; Fed. Cas. No. 15495); but the continuance of a cause alone is no ground for admission to bail. (United States v. Jones, 3 Wash. C. C. 224; Fed. Cas. No. 15495.) Although a party has forfeited his right to bail by absconding, yet he may be let to bail if there will be a delay in the trial (United States v. Lee, 6 Phila. 96; Fed. Cas. No. 8180); and on his subsequent appearance he may be required to give additional security (United States v. Feely, 1 Brock, 255; Fed. Cas. No. 15082); and a recognizance given after judgment on plea of guilty stricken out is binding on the sureties. (Basset v. United States, 9 Wall. 38.) A party absconding cannot, after recapture, demand to be admitted to bail as a matter of right. (United States v. Lee, 6 Phila. 96; Fed. Cas. No. 8180.) This court may admit to bail on the charge of high treason. (United States v. Hamilton, 3 Dall. 17; United States v. Stewart, 2 Dall. 343.)

Recognizance.—A recognizance is sufficient if it sets out the act without any particulars (United States v. Dennis, 1 Bond, 103; Fed. Cas. No. 14949; United States v. Dunbar, 83 Fed. Rep. 151); but if it does not set out an act made an offense by act of Congress it is void. (United States v. Hand, 6 McLean, 274; Fed. Cas. No. 15296.) It is valid although the parties do not sign it (United States v. Pickett, 1 Bond, 123; Fed. Cas. No. 16043); but the signature of

a person to a recognizance on a subsequent day does not make him a party to it if his name does not appear on the body of the instrument. (United States v. Pickett, 1 Bond, 123; Fed. Cas. No. 16043.) A single recognizance for a total amount is void where separate recognizances are required. (United States v. Goldstein, 1 Dill. 413; Fed. Cas. No. 15226.) A recognizance of bail in a criminal case is a means of compelling the party to submit to trial and punishment. (Ex parte Milburn, 9 Peters, 704.) It is no defense to a recognizance that it was taken and acknowledged by the clerk of the district court where this was done by order of the judge at the request of the accused (Hunt v. United States, 27 U. S. App. 287; 63 Fed. Rep. 568); and it is no objection to such recognizance that a warrant for the removal of the accused from the district where arrested, was not signed by the proper judicial officer. (Hunt v. United States, 19 U. S. App. 683; 61 Fed. Rep. 795.)

Power to take bail.—The power to take bail is in the discretion of the court. (United States v. Burr, 1 Burr's Trial, 79.) The court cannot grant the right to give bail without authority to do so by law. (United States v. Hudson, 65 Fed. Rep. 68.) So a commissioner has the same power as a State magistrate. (United States v. Horton's Securities, 2 Dill. 94; Fed. Cas. No. 15393.) And he may release a party on bail at any time before issuing the warrant for removal. (United States v. Volz, 14 Blatchf. 15; Fed. Cas. No. 16627.) A justice of the peace has no power to admit to bail after commitment. (United States v. Faw, 1 Cranch C. C. 486; Fed. Cas. No. 15078.) A clerk may take the acknowledgment, and justify the obligors to a bail bond (United States v. Evans, 2 Fed. Rep. 147; 2 Flip. 605); and a recognizance good as a common-law bond will be good as a statutory bond. (United States v. Evans, 2 Fed. Rep. 147; 2 Flip. 605.)

Liability.—A recognizance to appear from day to day is not discharged by quashing the indictment (United States v. White, 5 Cranch C. C. 368; Fed. Cas. No. 16678); but if accused appears at the next term, and the court passes away without taking any order respecting him, he is discharged. (United States v. Burr, 1 Burr's Trial, 79.) So an agreement to continue the case for an indefinite period discharges the bail. (Reese v. United States, 9 Wall. 13.) The accused must appear on the first day of the term (United States v. Hodgkin, 1 Cranch C. C. 510; Fed. Cas. No. 15375); and if he forfeits his recognizance a motion in arrest of judgment will not be heard till he appears and submits to the jurisdiction of the court (United States v. Askins, 4 Cranch C. C. 98; Fed. Cas. No. 14471; United States v. Erskine, 4 Cranch C. C. 499; Fed. Cas. No. 15057); and proceedings to enforce the default may be stayed to await his trial. (United States v. Feely, 1 Brock. 255; Fed. Cas. No. 15082.) The death of the principal after default will not exonerate the sureties. (United States v. Van Fossen, 1 Dill. 406; Fed. Cas. No. 16607.) Nor will his subsequent imprisonment and conviction under State laws exonerate the bail. (United States v. Van Fossen, 1 Dill. 406; Fed. Cas. No. 16607.)

§ 549. Bail admitted in capital cases.—Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the supreme court or a circuit court, or by a justice of the supreme court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law. (Rev. Stats. sec. 1016.)

Note.—A person charged with treason may be admitted to bail (United States v. Hamilton, 3 Dall. 17; 1 Burr's Trial, 310); but not except under strong circumstances after indictment. (United States v. Stewart, 2 Dall. 343; 1 Burr's Trial, 310.) The sum should be sufficient to insure the appearance of the party, but not so great as to be oppressive. (1 Burr's Trial, 18, 104.)

§ 550. **Bail in criminal cases removed to supreme court from State courts.**—When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the constitution, or any statute of, or commission held or authority exercised under the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given: and if the offense is not so bailable, until a final judgment upon the writ of error. [See sec. 709.] (Rev. Stats. sec. 1017.)

§ 551. **Surrender of criminals by their bail.**—Any party charged with a criminal offense and admitted to bail may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of

such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law. (Rev. Stats. sec. 1018.)

§ 552. **New bail to be given in certain cases.**—When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof. (Rev. Stats. sec. 1019.)

§ 553. **When penalty of recognizances may be remitted.**—When any recognizance in a criminal cause taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced. (Rev. Stats. sec. 1020.)

Recognizance, relief of the surety.—Where there is no collusion the court has the power to relieve the surety from the penalty of the recognizance. (United States v. Duncan, 10 Pittsb. L. J. 41; Fed. Cas. No. 15004.) So if the bail produce the prisoner they may be released, although the delay may have been prejudicial to the government (United States v. Duncan, 10 Pittsb. L. J. 41; Fed. Cas. No. 15004); but the penalty of a forfeited recognizance will not be remitted upon the ground that the party when called was in custody of a State officer on a criminal charge. (United States v. Stricker, 12 Blatchf. 389; Fed. Cas. No. 16410.) If the trial for a misdemeanor proceeds after defendant has been called and defaulted and defendant is acquitted, the default my be set aside (United States v. Santos, 5 Blatchf. 104; Fed. Cas. No. 16222); but if there is good cause to believe accused is guilty, default will not be set aside. (United States v. Mercer, Deady, 502; Fed. Cas. No. 15758.) If judgment has been entered on the recognizance it may be set aside, and the recognizance respited upon production of the prisoner. (United States v. Duncan, 10 Pittsb. L. J. 41; Fed. Cas. No. 15004; see United States v. Cookendorfer, 5 Cranch C. C. 113; Fed. Cas. No. 14856.)

§ 554. **Indictments.**—No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors. (Rev. Stats. sec. 1021.)

§ 555. **Offenses prosecuted by indictment or information.**—All crimes and offenses committed against the provision of chapter seven, title "Crimes," which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney. (Rev. Stats. sec. 1022.)

Offenses, how prosecuted.—Offenses not capital or infamous may, in the discretion of the court, be prosecuted by information (United States v. Sheppard, 1 Abb. 431; Fed. Cas. No. 16273; United States v. Maxwell, 3 Dill. 275; Fed. Cas. No. 15750; United States v. Block, 4 Saw. 211; Fed. Cas. No. 14609; United States v. Baugh, 1 Fed. Rep. 784; but see United States v. Joe, 4 Chic. L. N. 105; Fed. Cas. No. 15478), as mere misdemeanors. (United States v. Waller, 1 Saw. 701; Fed. Cas. No. 16634; United States v. Ebert, 1 Cent. L. J. 205; Fed. Cas. No. 15019.) The fact that an offense may or must be punished by imprisonment in the penitentiary does not necessarily make it infamous (United States v. Maxwell, 3 Dill. 275; Fed. Cas. No. 15750); and if a crime implies a total want of truth it is infamous, although only a misdemeanor (United States v. Block, 4 Saw. 211; Fed. Cas. No. 14609); but the species of crimen falsi is not infamous unless it injuriously affect the public administration of justice by falsehood and fraud. (United States v. Block, 4 Saw. 211; Fed. Cas. No. 14609.) The crimes which at our common law rendered a person infamous were treason, felony, and crimen falsi. (United States v. Block, 4 Saw. 211; Fed. Cas. No. 14609.) The term "infamous," at common law, was applied to certain crimes upon the conviction of which a person was incompetent as a witness. (United States v. Block, 4 Saw. 211; Fed. Cas. No. 14609; United States v. Maxwell, 3 Dill. 275; Fed. Cas. No. 15750.) The following crimes have been held infamous, the conviction whereof was sufficient to disqualify a person as a witness: larceny (State v. Gardner, 1 Root. 485), or knowingly receiving stolen goods (Com. v. Rogers, 7 Met. 500; but see Com. v. Murphy, 3 Pac. C. L. J. 390; Fed. Cas. No. 3067), forgery (Poage v. State, 3 Ohio St. 229; State v. Candler, 3 Hawks, 393), and all crimes which create

a violent presumption against the truthfulness of a party under oath. (Utley v. Merrick, 11 Met. 302.) It is not the character of the punishment but the nature of the act that makes a crime infamous (United States v. Block, 4 Saw. 211; Fed. Cas. No. 14609); but offenses which are merely misdemeanors are not within the term "infamous." (United States v. Ebert, 1 Cent. L. J. 205; Fed. Cas. No. 15019.) This section does not preclude the prosecution by information of such other offenses as may be so prosecuted consistently with the constitution and laws of the United States. (Ex parte Wilson, 114 U. S. 417; United States v. Petit, 114 U. S. 429.) In a prosecution in the Federal courts under the United States election laws, where the offense charged is on the border-line of Federal jurisdiction, it is the imperative duty of the court to require a clear and distinct averment of every fact essential to give the court jurisdiction. (United States v. Morrissey, 32 Fed. Rep. 147.) An indictment is not required before a Chinese person may be deported (In re Ng Loy Hoe, 53 Fed. Rep. 914).

§ 556. **Form of indictment for perjury.**—In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom, the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate,

other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed. (Rev. Stats. sec. 5396.)

§ 557. **Persons convicted of perjury incompetent witnesses.**—Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states and subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (Rev. Stats. sec. 5392.)

§ 558. **Indictment for subornation of.**—In every presentment or indictment for subornation of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, and without setting forth the commission or authority of the

court or person before whom the perjury was committed, or was agreed or promised to be committed. (Rev. Stats. sec. 5397.)

§ 559. **Perjury before a court-martial.** In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court. (Rev. Stats. sec. 1023.)

§ 560. **Charges joined in one indictment.**— When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated. (Rev. Stats. sec. 1024.)

Joinder of charges.—An indictment may contain several counts for offenses of the same class. (United States v. Bickford, 4 Blatchf. 337; Fed. Cas. No. 14591; Gardes v. United States, U. S. App., 87 Fed. Rep. 172; Ingraham v. United States, 155 U. S. 434.) And several offenses arising out of the same transaction may be charged in one indictment (United States v. Jacoby, 12 Blatchf. 491; Fed. Cas. No. 15462), if the crimes are merely misdemeanors

(United States v. Porter, 2 Cranch C. C. 60; Fed. Cas. No. 16072; United States v. Devlin, 6 Blatchf. 71; Fed. Cas. No. 14953); but the same count cannot charge a capital offense and another offense which is a misdemeanor. (United States v. Sharp, Peters C. C. 131; Fed. Cas. No. 16265.) Different counts may be joined in the same indictment if the judgment is the same for each offense (United States v. Goddard, 4 Cranch C. C. 444; Fed. Cas. No. 15220; United States v. Burns, 5 McLean, 23; Fed. Cas. No. 14691; United States v. Peterson, 1 Wood. & M. 305; Fed. Cas. No. 16037; United States v. Stetson, 3 Wood. & M. 164; Fed. Cas. No. 16390); and it may allege them to have been committed at different times and places. (United States v. O'Callahan, 6 McLean, 596; Fed. Cas. No. 15910.) The same offense may be charged in different ways in the same indictment in order to meet the facts of the case. (United States v. Pirates, 5 Wheat. 184; United States v. Dickinson, 2 McLean, 325; Fed. Cas. No. 14958.) So a count for an assault and battery and a count for riot (United States v. McFarland, 1 Cranch C. C. 163; Fed. Cas. No. 15675); or a count for making false coin with counts for aiding and procuring false coins to be made (United States v. Burns, 5 McLean, 23; Fed. Cas. No. 14691); or for counterfeiting coins at different times and on different occasions (United States v. O'Callahan, 6 McLean, 596; Fed. Cas. No. 15910); or for a revolt and exciting a revolt (United States v. Peterson, 1 Wood. & M. 305; Fed. Cas. No. 16037); or for stealing letters received at the office from various points (United States v. Brent, 17 Int. Rev. Rec. 54; Fed. Cas. No. 14640); but a count for conspiracy cannot be joined with a count for murder in the same indictment (United States v. Scott, 4 Biss. 29; Fed. Cas. No. 16241); nor counts for knowingly transmitting false paper with counts for subornation of perjury. (United States v.

Bickford, 4 Blatchf. 337; Fed. Cas. No. 14591.) The offenses of bigamy and adultery may be joined in one indictment, both at common law and under this section. (United States v. West (Utah), 27 Pac. Rep. 84.) Where two or more indictments found against a person for the same act or for two or more acts connected together the court may order them to be consolidated (Logan v. United States, 144 U. S. 263); and they may be ordered consolidated though two persons are jointly charged in each. (Turner v. United States, 30 U. S. App. 90; 66 Fed. Rep. 280.) Where an indictment contains several counts the court may, in the exercise of judicial discretion, require the government to elect certain counts upon which it will ask conviction. (Gardes v. United States, U. S. App., 87 Fed. Rep. 172.)

Practice.—Several persons cannot be charged jointly with an offense which is in its nature several. (United States v. Kazinski, 2 Sprague, 7; Fed. Cas. No. 15508.) The provisions of this section are obligatory, and all offenses and offenders that might have been joined previously must be joined now. (United States v. Kazinski, 2 Sprague, 7; Fed. Cas. No. 15508.) Where several offenses are charged and a general verdict is entered, judgment can only be entered for a single offense (United States v. Maguire, 3 Cent. L. J. 273; Fed. Cas. No. 15708); but if the prisoner is found guilty on several counts, he may be sentenced under one count, and the sentence on the other counts be suspended until the first sentence has been executed (United States v. Blaisdell, 3 Ben. 132; Fed. Cas. No. 14608); if sentenced under a cumulative judgment, it will be deemed valid in a collateral action. (Ex parte Peters, 4 Dill. 169; Fed. Cas. No. 11027.) If defendant has benefited by the joinder of offenses, his acquittal of some of the charges affords

no grounds for a new trial. (United States v. Brent, 17 Int. Rev. Rec. 54; Fed. Cas. No, 14640.)

§ 561. Indictments, defect of form.—No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (Rev. Stats. sec. 1025.)

Indictment, sufficiency of.—The rule that an indictment following the words of the statute is sufficient is subject to the qualification that all material facts and circumstances embraced in the definition of the offense must be stated. (United States v. Brazeau, 78 Fed. Rep. 464; In re Benson, 58 Fed. Rep. 962.) Mere mistakes in expressing the substance of a crime will be regarded as formal. (United States v. Jackson, 2 Fed. Rep. 502.) So an irregularity in summoning a grand jury is a mere matter of form. (United States v. Tuska, 14 Blatchf. 5; Fed. Cas. No. 16550.) A failure of the record to show that it was demanded of the accused to plead to the indictment or that he did so plead is not matter of form only which is cured by this section, but is a matter of substance. (Alex W. Crain v. United States, 162 U. S. 625.) So a defect in an indictment is cured if a criminal case is remitted from the district court to the circuit court for trial (United States v. McKee, 4 Dill. 1; Fed. Cas. No. 15687), although there is an imperfect and informal averment of an essential fact (United States v. Noelke, 1 Fed. Rep. 426; 17 Blatchf. 554); but an omission to state anything which is a part of the description of the crime will render an indictment defective. (United

States v. Conant, 9 Cent. L. J. 129; Fed. Cas. No. 14844.) So if an indictment sets forth a paper by a description, instead of giving it in haec verba, it is bad on motion in arrest of judgment. (United States v. Noelke, 1 Fed. Rep. 426; 17 Blatchf. 554.) This section governs on an application for a new trial in a Federal court, although a different rule obtains in the State courts. (United States v. Molloy, 31 Fed. Rep. 19.) And a new trial cannot be granted for such defects of form although the record fails to show an arraignment and plea before the trial. (United States v. Molloy, 31 Fed. Rep. 19.) The section was intended to declare that no mere irregularity or defect in the form of proceedings which did not tend to the prejudice of the defendant should be ground for a new trial, although a different rule obtains in State courts. (United States v. Molloy, 31 Fed. Rep. 19.) The purpose of the provision is, that where a real question of a difficult point of law arising in the case is such that the two judges sitting on the hearing differ in opinion in regard thereto, they may certify it to the supreme court for an answer. (United States v. Perrin, 131 U. S. 55.) One convicted in a State court cannot complain in a Federal court that the conviction by which he has been deprived of his liberty was not founded upon a good indictment. (In re Krug, 79 Fed. Rep. 309.) Surplusage in an indictment cannot be reached by demurrer of any character. (United States v. Patterson, 59 Fed. Rep. 280.) In an indictment for a statutory offense it is only necessary to negative an exception to the statute when that exception is such as to render the negative of it an essential part of the definition of the offense. (Shelp v. United States, 81 Fed. Rep. 694.) Sufficiency of an indictment for obstructing justice. (Pettibone v. United States, 148 U. S. 197.) In an indictment for a violation of a Federal statute it should not be left in doubt or to

mere inference from the words of the indictment whether the offense charged is one within Federal cognizance. (Blitz v. United States, 153 U. S. 308.) The existence of a technical defect in an information or indictment does not make it no information or indictment at all. (In re Rowe, 40 U. S. App. 516; 77 Fed. Rep. 161.)

§ 562. Judgment on demurrer to an indictment.—In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat* ouster; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require. (Rev. Stats. sec. 1026.)

§ 563. Several indictments against the same person, one writ sufficient.—When two or more charges are made, or two or more indictments are found, against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms. (Rev. Stats. sec. 1027.)

§ 564. Copy of writ to be jailer's authority.—Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer, as his authority to hold the prisoner, and the original writ, warrant, or mittimus shall be re-

turned to the proper court or officer, with the officer's return thereon. (Rev. Stats. sec. 1028.)

Note.—The above section does not render a prisoner's detention unlawful because of a defect in a copy of the writ, warrant, or mittimus. (Howard v. United States, 43 U. S. App. 678; 75 Fed. Rep. 986.)

§ 565. **Writ for removal of a prisoner from one district to another.**—Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed. (Rev. Stats. sec. 1029.)

§ 566. **No writ necessary to bring into court a person in custody.**—No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal. (Rev. Stats. sec. 1030.)

Note.—The above section applies only to the case of prisoners confined at the place where the court is in session and not to those in custody at a place remote therefrom. (United States v. Donahower, 56 U. S. App. 467; 85 Fed. Rep. 547.)

§ 567. **Peremptory challenges.**—If, in the trial of a capital offense, the party indicted peremptor-

ily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made. [See sec. 819.] (Rev. Stats. sec. 1031.)

§ 568. **Prisoners standing mute, etc.**—When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury. (Rev. Stats. sec. 1032.)

Standing mute.—Where defendant stands mute the court may enter a plea of not guilty and proceed with the trial. (In re Smith, 13 Fed. Rep. 25.) He should have an opportunity to plead, and trial without entry of a plea of not guilty is erroneous. (Palmer v. United States, 1 Wash. Ter. 7.) After he has put in a plea of not guilty it includes everything essential to put him on trial by jury. (United States v. Gilbert, 2 Sum. 19; Fed. Cas. No. 15204.) This section applies to an offense created by a statute enacted since its adoption. (United States v. Hare, 2 Wheel. C. C. 283; Fed. Cas. No. 15304; see generally Ellewood v. Com., 10 Met. 222; Com. v. McKenna, 125 Mass. 397; Com. v. Braley, 1 Mass. 103; Com. v. Hill, 14 Mass. 207; Dyott v. Com., 5 Whart. 67;

United States v. Hare, 2 Wheel. C. C. 283; Fed. Cas. No. 15304; Com. v. Moore, 9 Mass. 402; United States v. Reid, 12 How. 361.) Until defendant has pleaded to the indictment there is no issue to be submitted to the jury, and an omission to plead is fatal to the judgment in cases of misdemeanor as well as infamous crimes. (Shelp v. United States, 48 U. S. App. 376; 81 Fed. Rep. 694.)

§ 569. Copy of indictment, etc., delivered to prisoner.—When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial. (Rev. Stats. sec. 1033.)

Treason.—The provision as to three days is expressly confined to treason. (United States v. Wood, 3 Wash. C. C. 440; Fed. Cas. No. 16756.) The prisoner is entitled to a reasonable time after the copy is delivered to him to investigate the character and conduct of the witnesses. (United States v. Stewart, 2 Dall. 343.) The list of jurors and witnesses need not specify their occupations (United States v. Insurgents, 2 Dall. 335); but the townships in which they respectively reside should be specified (United State v. Insurgents, 2 Dall. 335); and copies of both caption and indictment should be delivered to the prisoner.

Other offenses.—In capital offenses other than treason the copy must be delivered two days before the cause is tried by a jury, and not before the party is arraigned (United States v. Curtis, 4 Mason, 232, Fed. Cas. No. 14905; but see U. S. v. Dow, Taney, 34, Fed. Cas. No. 14990); and the two entire days must be exclusive of the day of its delivery (U. S. v. Dow, Taney, 34, Fed. Cas. No. 14990). If the right to a copy is not insisted on before pleading and trial no objection can afterward be taken to the proceedings (United States v. Cornell, 2 Mason, 91, Fed. Cas. No. 14868); if he makes no objection till after the jury has been sworn the omission is no ground for arrest of judgment, or for a new trial (U. S. v. Curtis, 4 Mason, 232, Fed. Cas. No. 14905). If he acknowledges before arraignment the receipt of a copy, it is a waiver of his right if he has not received it (U. S. v. Cornwell, 2 Mason, 91, Fed. Cas. No. 14868). If the case is not capital the prisoner is not entitled to a copy of the indictment at government expense (U. S. v. Bickford, 4 Blatchf. 337, Fed. Cas. No. 14591; U. S. v. Hare, 2 Wheel. C. C. 283, Fed. Cas. No. 15304); nor is he entitled to a list of witnesses or jurors (U. S. v. Williams, 4 Cranch C. C. 372, Fed. Cas. No. 16712; U. S. v. Wood, 3 Wash. C. C. 440, Fed. Cas. No. 16756; Shelp v. United States, 81 Fed. Rep. 694); but in all cases where there has been no preliminary examination the court, in its discretion, may order a list of witnesses before the grand jury to be furnished (U. S. v. Southmayd, 6 Biss. 321, Fed. Cas. No. 16361); and a copy of the indictment may be granted on his request (U. S. v. Williams, 1 Cranch C. C. 178. Fed. Cas. No. 16709; U. S. v. Curtis, 4 Mason, 232, Fed. Cas. No. 14905). This section does not apply to rebuttal witnesses; they are not disqualified by an absence of a notice naming them as witnesses. (Goldsby v. United States, 160 U. S. 70.)

§ 570. Counsel and witnesses for defendant in capital cases.—Every person who is indicted of treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours. He shall be allowed in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on behalf of the prosecution. (Rev. Stats. sec. 1034.)

Note.—Accused has the right to compulsory process for witnesses even before indictment. (Burr's Trial, 177.)

§ 571. Verdict of less offense than charged.—In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; *provided*, that such atttempt be itself a separate offense. (Rev. Stats. sec 1035.)

Note.—The indictment charging murder is sufficient upon a verdict of manslaughter. (U. S. v. Leonard, 2 Fed. Rep. 689; 18 Blatchf. 187.) It is not competent for the court to instruct the jury peremptorily to find the accused guilty of the offense charged or of any criminal offense less than that charged (Sparf v. United States, 156 U. S. 51).

§ 572. Verdict against part of several joint defendants.—On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury. (Rev. Stats. sec. 1036.)

Note.—A jury may find a verdict of guilty or not guilty as to part of defendants jointly tried in a criminal case and disagree as to the others (Bucklin v. United States, 159 U. S. 682). On an indictment charging conspiracy the acquittal of one is an acquittal of both (U. S. v. Hamilton, 8 Chic. L. N. 211, Fed. Cas. No. 15288); but if it charges a conspiring of defendants with others unknown, a verdict may be rendered against one, and in favor of the other. (U. S. v. Hamilton, 8 Chic. L. N. 211, Fed. Cas. No. 15288.)

§ 573. Indictments remitted by circuit and district courts to each other.—Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court. And such remission shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the

court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment, and all other proceedings in the same, had been originated in said court. (Rev. Stats. sec. 1037.)

Note.—The object of this section is the transmission of a criminal case with all the proceedings therein from one court to another. (U. S. v. McKee, 4 Dill. 1, Fed. Cas. No. 15687.) A case remitted from the circuit to the district court may be sent back under proper circumstances. (U. S. v. Murphy, 3 Wall. 649.) The original indictment need not be sent; a certified copy is sufficient. (U. S. v. McKee, 4 Dill. 1, Fed. Cas. No. 15687). A circuit court cannot, of its own motion, on an application of defendant, remit an indictment. (U. S. v. Bennett, 16 Blatchf. 338, Fed. Cas. No. 14571.) After conviction in the district court, the indictment cannot be lawfully remitted to the circuit court under this section. (United States v. Haynes, 26 Fed. Rep. 857. And see In re Haynes, 30 Fed. Rep. 767.) In a criminal cause, the circuit court may amend its record after remission to the district court. (Kelly v. United States, 27 Fed. Rep. 616.) The circuit court has jurisdiction of an indictment remitted from the district court, after the defendant had pleaded. (United States v. Richardson, Cir. Ct. Me., 28 Fed. Rep. 61.)

§ 574. **Remission from district to circuit court of difficult cases.**—Any district court may, by order entered on its minutes, remit any indictment pending therein to the next session of the circuit court, for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same

in the circuit court as if such indictment had been originally found and presented therein. (Rev. Stats. sec. 1038.)

Note.—An indictment will not be remitted to the circuit court except in cases of manifest and grave importance (U. S. v. O'Sullivan, 9 N. Y. Leg. Obs. 193, Fed. Cas. No. 15973); and when remitted, it may be remitted even after the term when it was presented. (U. S. v. Morris, 1 Curt. 23, Fed. Cas. No. 15815.) The mere fact that exposition to a statute has been given by the district judge is no ground for remitting the indictment. (U. S. v. O'Sullivan, 9 N. Y. Leg. Obs. 193, Fed. Cas. No. 15973.)

§ 575. All capital cases remitted from district to circuit courts.—Every indictment of a capital offense presented to a district court, together with the recognizances taken therein, shall, by order entered on its minutes, be remitted to the next session of the circuit court for the same district; and on the filing of such order and indictment with the clerk of such circuit court, that court shall proceed thereon in the same manner as if said indictment had been originally found and presented therein. (Rev. Stats. sec. 1039.)

§ 576. Capital case carried to the supreme court.—Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the supreme court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the supreme court in the case is received and en-

tered upon the records of such lower court. In case of affirmance by the supreme court, the court rendering the original judgment shall appoint a day for the execution thereof; and in case of reversal, such further proceedings shall be had in the lower court as the supreme court may direct. (Rev. Stats. sec. 1040.)

§ 577. **Judgments for fines, how collected.**—In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced; *provided*, that where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid. (Rev. Stats. sec. 1041.)

Note.—If nothing is said in the judgment as to the mode of enforcing it, a fi. fa. or a capias pro fine may be issued; but if a fi. fa. is provided for, a capias cannot issue; and if it provides that the party stand committed until the fine is paid a capias pro fine may be issued. (Ex parte Teuscher, 23 Int. Rev. Rec. 202, Fed. Cas. No. 13846.) A person sentenced to pay a fine may be committed till the fine is paid. (U. S. v. Robbins, 15 Int. Rev. Rec. 155, Fed. Cas. No. 16171.) It is within the discretion of the court to order his imprisonment until the fine is paid. (Ex parte Jackson, 96 U. S. 727.)

§ 578. Poor convicts sentenced and imprisoned for fines.—When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of [State where oath is administered]: and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts. [See secs. 847, 5296.] (Rev. Stats. sec. 1042.)

Note.—A convict is not entitled to release on a conditional pardon. (In re Ruhl, 5 Sawy. 186, Fed. Cas.

No. 12124.) This section implies that a fine may be enforced by imprisonment until paid (In re Greenwald, 77 Fed. Rep. 590).

§ 579. **For offenses against navigation laws—When summary trials may be had.**—Whenever a complaint shall be made against any master, officer, or seaman of any vessel belonging, in whole or in part, to any citizen of the United States, of the commission of any offense, not capital or otherwise infamous, against any law of the United States made for the protection of persons or property engaged in commerce or navigation, it shall be the duty of the district attorney to investigate the same, and the general nature thereof, and if, in his opinion, the case is such as should be summarily tried, he shall report the same to the district judge, and the judge shall forthwith, or as soon as the ordinary business of the court will permit, proceed to try the cause, and for that purpose may, if necessary, hold a special session of the court, either in term-time or vacation. (Rev. Stats. sec. 4300.)

§ 580. **Complaint and answer.**—At the summary trial of offenses against the laws for the protection of persons or property engaged in commerce or navigation, it shall not be necessary that the accused shall have been previously indicted, but a statement of complaint, verified by oath in writing, shall be presented to the court, setting out the offense in such manner as clearly to apprise the accused of the character of the offense complained of, and to enable him to answer the complaint.

The complaint or statement shall be read to the accused, who may plead to or answer the same, or make a counter-statement. The trial shall thereupon be proceeded with in a summary manner, and the case shall be decided by the court unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial shall be upon the complaint and plea of not guilty. (Rev. Stats. sec. 4301.)

§ 581. **Amendments and adjournments.**—It shall be lawful for the court to allow the district attorney to amend his statement of complaint at any stage of the proceedings before verdict, if, in the opinion of the court, such amendment will work no injustice to the accused; and if it appears to the court that the accused is unprepared to meet the charge as amended, and that an adjournment of the cause will promote the ends of justice, such adjournment shall be made until a further day, to be fixed by the court. (Rev. Stats. sec. 4302.)

§ 582. **Challenges to jurors.**—At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause, in such cases, shall be tried by the court without the aid of triers. (Rev. Stats. sec. 4303.)

§ 583. **Limit of sentences.**—It shall not be lawful for the court to sentence any person convicted in such trial to any greater punishment than imprisonment in jail for one year, or to a fine exceed-

ing five hundred dollars, or both, in its discretion, in those cases where the laws of the United States authorize such imprisonment and fine. (Rev. Stats. sec. 4304.)

§ 584. **Penalties, etc., under navigation laws, how prosecuted, etc.**—All the penalties and forfeitures which may be incurred for offenses against this title may be sued for, prosecuted, and recovered in such court, and be disposed of in such manner, as any penalties and forfeitures which may be incurred for offenses against the laws relating to the collection of duties, except when otherwise expressly prescribed. (Rev. Stats. sec. 4305.)

§ 585. **Fugitives from the justice of a foreign country.**—Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the

evidence sufficient to sustain the charges under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. (Rev. Stats. sec. 5270.)

International extradition.—Extradition is a right of foreign governments only, not of individuals. (In re Extradition of Ferrelle, 28 Fed. Rep. 878.) A foreign government has no right by the law of nations to demand of the government of the United States a surrender of a citizen or subject of such foreign government, who has committed a crime in his own country, and is afterward found within the limits of the United States. It is a right which has no existence, and can only be secured by a treaty stipulation. As between the United States and foreign governments the surrender of fugitives from justice depends upon treaties. (Dos Santos' Case, 2 Brock. 493, Fed. Cas. No. 4016; United States v. Davis, 2 Sumn. 482, Fed. Cas. No. 14932; In re Metzger, 5 How. 176; 6 Op. Att'y-Gen. 85; 1 Op. Att'y-Gen. 68, 510; 3 Op. Att'y-Gen. 661; 2 Op. Att'y-Gen. 359; 7 Op. Att'y-Gen. 536; 1 Kent's Com. 39 n.; Wheat. Int. L. 171.) The treaty of 1842 is not only a contract between the government of Great Britain and the United States, but it is also the law of this land; and a person may, if occasion require, invoke the treaty in any judicial proceeding as a protection

against detention or trial. (Ex parte Hibbs, 26 Fed. Rep. 421.) The treaty with France of 1843, providing for the surrender of fugitives from justice, cannot be executed by the President of the United States without an act of Congress. No person can be surrendered under that treaty who is merely charged with crime before a committing magistrate. He must, under our law, be indicted, or under the French law, be mis en accusation by the chambre des mises en accusation. (See In re Metzger, 1 Edm. Sel. Cas. 422.) In the absence of a treaty stipulation, it is optional to surrender or not citizens of other countries, to answer for offenses committed at home, though in case of mere political offenses it is seldom done. (In re Sheazle, 1 Wood. & M. 68, Fed. Cas. No. 12734; Holmes v. Jennison, 14 Pet. 540, 549; United States v. Davis, 2 Sumn. 482, 486, Fed. Cas. No. 14932; Mure v. Kaye, 4 Taunt. 34; Commonwealth v. Deacon, 10 Serg. & R. 135; 2 Wheel. Cr. Cas. 15; 1 Am. St. Pap. 115; New York v. Miln, 11 Pet. 102; United States v. Nash, Bee Adm. 266, Fed. Cas. No. 16175.) The United States government has never recognized the right, unless under treaty stipulations. (In re Fetter, 23 N. J. L. 313; 57 Am. Dec. 384; Com. v. Deacon, 10 Serg. & R. 135; Story's Conf. L., secs. 626, 1808; Jefferson's Letter to Washington, 7th Nov. 1791; Jefferson's Letter to Genet, 1793, 1 Am. St. Pap. 175; Story's Letter to Gov. Everett, June 6, 1835, cited in 2 Life of Story, 179; 1 Kent's Com. 37, note.) Extradition is to be effectuated through the agency of the tribunals of justice, whose province it is to determine the existence of reasonable cause for the charge of crime, and if there be sufficient evidence to justify putting the accused upon his trial. (In re Metzger, 1 Edm. Sel. Cas. 402.) Under the treaty with Great Britain of 1842 a preliminary mandate from the executive is not necessary. (In re Herres,

33 Fed. Rep. 165.) One accused of poisoning, resulting in death in Canada, may be extradited, though it appears that the poison, if administered at all, was given in this country (Sternaman v. Peck, 83 Fed. Rep. 690).

Right exists only under treaty stipulations.—Except under the provisions of treaties, the delivery by one country to another of fugitives from justice is a matter of comity, not of obligation. (United States v. Rauscher, 119 U. S. 407.) Extradition from a foreign country although for a crime committed against the law of a State, must be negotiated through the Federal government. (United States v. Rauscher, 119 U. S. 407.) Extradition treaties of the United States do not guarantee a fugitive an asylum in any foreign country. So far as they regulate the right of asylum at all, they limit it. (Ker v. Illinois, 119 U. S. 436.)

Conduct of proceedings.—The rules prescribed for the conduct of proceedings under extradition treaties are: 1. Demand for surrender and mandate of the President; 2. Previous designation of the commissioner before whom the warrant of arrest is returnable; 3. Certificates to documentary evidence; 4. Record by the commissioner of the proceedings before him; 5. Verified transactions of documents in foreign languages; 6. Contents of complaint. (Re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6369.) Whether a party making complaint is duly authorized to appear in behalf of the foreign government is a matter to be inquired into before the commissioner. (Re Kelly, 26 Fed. Rep. 852.) On motion of a sovereignty making the demand, a commissioner may, in his discretion, adjourn the hearing of the extradition proceedings. (Re Ludwig, 32 Fed. Rep. 774.)

Requisition for process and surrender.—Requisitions should issue from the supreme political authority of the demanding State, and be addressed to the secretary of State. (8 Op. Att'y-Gen. 240; Op. Att'y-Gen. 201; 7 Ap. Att'y-Gen. 6; 8 Op. Att'y-Gen. 420; Re Henrich, 5 Blatchf. 414, Fed. Cas. No. 6369.) The requisition need not be founded on an indictment or warrant issued on an indictment. (Re British Prisoners, 1 Wood. & M. 66, Fed. Cas. No. 12734; Re Thomas, 12 Blatchf. 370, Fed. Cas. No. 13887.) Proceedings for extradition need not necessarily be initiated by a requisition from a foreign government (In re Adutt, 55 Fed. Rep. 376). To authorize arrest and removal from the State or country, it must appear on the application that the crime was committed in the State or country from which the requisition proceeds. (Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12968; 6 L. R. 57; 8 Op. Att'y-Gen. 215, 306; 1 Op. Att'y-Gen. 83; Re Vogt, 14 Op. Att'y-Gen. 251.) A requisition for a return of a fugitive from justice cannot be denied when the indictment or affidavit, of which a copy is attached to the requisition, would be held sufficient by the courts of the State where the offense was committed (Webb v. York, 49 U. S. App. 163; 79 Fed. Rep. 616).

Complaint under oath requisite.—A complaint made under oath is necessary to authorize a warrant to compel a preliminary examination of a person demanded by a foreign government as a criminal. (Ex parte McCabe, 46 Fed. Rep. 363.) It must be a complaint by some one authorized to represent the executive department of the foreign treaty power. (Re Extradition of Ferrelle, 24 Blatchf. 155; 28 Fed. Rep. 878.) It is not necessary that the attorney-general, or any member of the executive department of a foreign nation, should himself make the complaint

on which the accused is arrested. Any person whom he authorizes or whom he delegates to act for that government is a proper person to appear and file a complaint. (Re Kelly, 26 Fed. Rep. 852.) If the complaint be made by a private individual, his authority to act in behalf of the foreign executive should be made to appear before the proceedings before the commissioner are closed, or the proceeding should be dismissed. (Re Extradition of Ferrelle, 24 Blatchf. 155; 28 Fed. Rep. 878.) In a complaint for a warrant of extradition, the crime must be clearly set forth and the facts constituting it must be stated; but the averments need not be upon personal knowledge. (Re Farez, 7 Blatchf. 34, 345, 491, Fed. Cas. Nos. 4644, 4645, 4646; 2 Abb. U. S. 346; 40 How. Pr. 107; Ex parte Van Hoven, 4 Dill. 411, Fed. Cas. No. 16858; Ex parte Sternaman, 77 Fed. Rep. 595.) If it appear in the proceedings that they are initiated and carried on by a foreign government, it is sufficient, although the complaint does not show the fact. (Re Herres, 33 Fed. Rep. 165; reversing 32 Fed. Rep. 583.)

Warrant of arrest.—The fact that the commissioner who issued the warrant is authorized so to do is jurisdictional and must appear upon the face of the warrant. (Re Kelly, 25 Fed. Rep. 270.) Proceedings for extradition may be commenced by the arrest of the person charged, under a warrant issued by a United States commissioner on complaint of a foreign consul without a requisition. (In re Adutt, 55 Fed. Rep. 376.) Under the treaty with Great Britain, no authority is required from the executive department of the United States to enable a judge, magistrate, or commissioner to issue a warrant for the arrest of an alleged fugitive from justice. (Ex parte Ross, 2 Bond, 252; Fed. Cas. No. 12069.) It is not necessary, preliminary to an investigation here, that a warrant

of arrest should have been issued in the foreign jurisdiction. (Re Thomas, 12 Blatchf. 370; Fed. Cas. No. 13887.) Where a warrant of extradition recited that the party was accused of the crime of forgery, without saying what forgery, resort might be had to the proceedings before the committing magistrate, and his report, on which the warrant was issued, to ascertain what and how many forgeries the extradition was intended to apply to or include. (Ex parte Hibbs, 26 Fed. Rep. 421.) The term "forgery" in the extradition act means that which by universal acceptation it is understood to mean. (Re Tully, 22 Blatchf. 220; 20 Fed. Rep. 812.) The district judge may issue a second warrant, where the first was of questionable regularity. (Re Fergus, 30 Fed. Rep. 607.) The warrant may run throughout the United States, and may be executed by any marshal or deputy marshal. (Re Fergus, 30 Fed. Rep. 607.) Where a district judge at chambers decided that there was sufficient cause for surrender of a fugitive claimed by the French government under a treaty, the supreme court had no jurisdiction to review that decision. (Re Metzger, 5 How. 176.) The governor's warrant for an arrest as a fugitive from justice, on a requisition, can be issued only on an affidavit accompanying the requisition which positively and directly charges the commission of a specific offense. (Ex parte Spears, 88 Cal. 640.) A warrant, when issued by a county judge under section 5270, although he styles himself also an extradition agent, is not invalid because it does not recite the source of his authority to issue it. (Ex parte McCabe, 46 Fed. Rep. 363.) Upon application from the British government an arrest of a British subject seeking an asylum in this country may be made upon a British vessel within our territory. (In re Newman, 79 Fed. Rep. 622.)

§ 586. Subpoena of witnesses—Costs of process and fees of witnesses, how paid.—On the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States. (Approved August 3, 1882, sec. 3; 22 U. S. Stats. 216, superseding Rev. Stats. sec. 5271.)

§ 587. Witness fees, costs, etc., to be certified to secretary of state.—All witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing takes place to the secretary of state of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the secretary of state shall cause the amount of said fees and costs so allowed to be reimbursed to the government of the United States by the foreign government by whom the proceedings for extradition may have

been instituted. (Approved August 3, 1882, sec. 4. 22 U. S. Stats. 216.)

§ 588. **Surrender of the fugitive.**—It shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape. (Rev. Stats. sec. 5272.)

Surrender under treaty.—Persons may be surrendered under a treaty made after the crime was committed, and after their arrival in this country. (In re Giacomo, 12 Blatchf. 391; Fed. Cas. No. 3747.) Under the constitution, the subject of intercourse with foreign powers is vested exclusively in the United States government, and States have no authority to grant or cause the extradition of one of its citizens on demand of a foreign power. (People v. Curtis, 50 N. Y. 321; Holmes v. Jennison, 14 Pet. 540; Ex parte Smith, 3 McLean, 121; Fed. Cas. No. 12968; Cooper v. Galbraith, 3 Wash. C. C. 546; Fed. Cas. No. 3193.) No

State can deliver up a fugitive to a foreign government, as it cannot have treaty relations with such government. (Holmes v. Jennison, 14 Pet. 540.) State courts cannot interfere with the surrender of a fugitive, and the marshal may disregard their process. (6 Op. Atty.-Gen. 227, 237, 270, 290, 466, 713; 7 Op. Atty.-Gen. 482.) A person will not be surrendered to a foreign power where the United States has jurisdiction over the offense charged. (6 Op. Atty.-Gen. 85; 8 Op. Atty.-Gen. 215, 306; In re Stupp, 11 Blatchf. 124; Fed. Cas. No. 13562.) If it appears that there is probable reason to believe defendant guilty, justice requires that he should be put upon his trial. (Re Herres, 33 Fed. Rep. 165.) Where a commissioner, without special authority, issued a warrant, at the instance of the British consul, for the arrest of a fugitive charged with assault with intent to murder in Ireland, habeas corpus did not lie to relieve him from the arrest. (Re Kaine, 14 How. 103.) The law of nations does not require the surrender of a fugitive, whether citizen or alien, to a foreign government, in the absence of a treaty stipulation requiring it. (Ex parte McCabe, supra.) A citizen of the United States cannot be surrendered to Mexico as a fugitive, under the treaty with that country, which provides that "neither of the contracting parties shall be bound to deliver up its own citizens." (Id.) But a person may be extradited to Mexico for the crime of forgery of an instrument, which is made an offense by the Mexican laws, he having been held in Mexico for the offense. (Benson v. Mc Mahon, 127 U. S. 457.) Under the treaties of 1852 between the United States and Prussia, and other States of the Germanic Confederation, an application should be granted where the evidence is such as to fairly prove the charge. (Re Risch, 36 Fed. Rep. 546.) A person brought to this country by extradition

proceedings cannot be convicted of any other offense than that charged, although upon the same evidence which was produced before the committing magistrate in England, in the extradition proceedings. (United States v. Rauscher, 119 U. S. 407.)

Immunity from arrest in civil action.—One who has been extradited, under a treaty with a foreign country, upon a charge of which he is acquitted, is not, before the expiration of a reasonable time for his return to the country from which he was extradited, subject to arrest in a civil action in a State court for any cause arising prior to his extradition. (Re Reinitz, 39 Fed. Rep. 204; United States v. Rauscher, supra.)

§ 589. **Time allowed for extradition.**—Whenever any person who is committed under this title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the secretary of state, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered. (Rev. Stats. sec. 5273.)

§ 590. **Continuance of provisions limited.**—The provisions of this title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer. (Rev. Stats. sec. 5274.)

§ 591. **Protection of the accused.**—Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime for which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused. (Rev. Stats. sec. 5275.)

§ 592. **Powers of agent receiving offenders delivered by a foreign government.**—Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and

to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping. (Rev. Stats. sec. 5276.)

§ 593. **Penalty for opposing agents, etc.**—Every person who knowingly and willfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment for not more than one year. (Rev. Stats. sec. 5277.)

§ 594. **Evidence on the hearing in extradition cases.**—In all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing, for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such for-

eign country shall be proof that any deposition, warrant, or other paper, or copies thereof, so offered, are authenticated in the manner required by this act. (22 U. S. Stats. 216, sec. 5.)

Hearing on application for extradition.—The proceedings are not to be conducted with extreme technicality. (In re Breen, 73 Fed. Rep. 458.) Where there is an application for extradition sustained by complaint on oath, it is not for the judge to consider whether or not a foreign government has authorized the application; he has only to examine the evidence of criminality, and if not sufficient to sustain the charge, to certify the same to the secretary of State. (Re Dugan, 2 Low. 367; Fed. Cas. No. 4120.) The first question is one of law, open upon the face of the papers to judicial inquiry; the second is one of fact, upon which the governor's decision is sufficient to justify removal until the presumption in his favor is overthrown. (Roberts v. Reilly, 116 U. S. 80.) In a proceeding under the treaty with Great Britain, evidence of criminality must be such as would justify the arrest and commitment of the accused according to law in the place where he is found. (Re McPhun, 24 Blatchf. 254; 30 Fed. Rep. 57; Ex parte Kaine, 3 Blatchf. 1; Fed. Cas. No. 7597; United States v. Warr, 3 N. Y. Leg. Obs. 346; Fed. Cas. No. 16644; Re Heilbronn, 12 N. Y. Leg. Obs. 65; Fed. Cas. No. 6323; 4 Op. Atty.-Gen. 201, 330; Re Kelly, 2 Low. 339; Fed. Cas. No. 7655; Re MacDonnell, 18 Int. Rev. Rec. 11; Fed. Cas. No. 8772; Re Farez, 2 Abb. U. S. 346; Fed. Cas. No. 4645.) Where a requisition was had on a charge of embezzling money, an indictment for embezzling money and property simply charges the same offense in different ways to meet the evidence as it may appear on the trial, and is unobjectionable. (Waterman v. State, 116 Ind. 51.) On the extradi-

tion of a person charged with forgery, embezzlement, and larceny, the demanding government and a commissioner need not elect the charge for which he shall be tried. (Bryant v. United States, 167 U. S. 104.)

Evidence admissible.—Copies of depositions taken by a magistrate in a foreign country must be certified by the United States consul there to be authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country. (Re McPhun, 24 Blatchf. 254; 30 Fed. Rep. 57.) Upon hearing a case arising under treaty, not only copies of depositions, but also copies of warrants and other papers, certified under the hand of the person issuing the same, and attested on oath of the party producing them to be true copies, are admissible as evidence of criminality of the accused. (Ex parte Ross, 2 Bond, 252; Fed. Cas. No. 12069.) The act of congress of 1860, relating to proof of authenticity of papers produced in the proceedings does not repeal prior acts, but merely provides another mode of authentication. (Ibid.) The judicial proceeding in a Prussian court being valid evidence in that country, a certificate of the United States minister that the documents are legally authenticated entitles them to be received here as evidence where the certificates are in sufficient form. (Re Behrendt, 23 Blatchf. 40; 22 Fed. Rep. 609; Re Farez, 7 Blatchf. 345; Fed. Cas. No. 4645; Re Wadge, 15 Fed. Rep. 864; 21 Blatchf. 300.) Under the act of 1882 regarding evidence in extradition cases, the certificate of the resident minister to copies of documentary evidence from abroad may be supplemented by oral proof of competency of the originals. (Re Wadge, 15 Fed. Rep. 864; 21 Blatchf. 300; Re Heinrich, 5 Blatchf. 414; Fed. Cas. No. 6369.) Under the Revised Statutes, depositions may be authenticated by a vice-consul of the United States. (Re Herres, 33 Fed. Rep. 165.) In an extradition proceed-

ing under the treaty with Great Britain of August 9, 1842, the evidence of the fugitive's criminality must be such as would justify his apprehension and commitment according to the law of the place where he is found. (Re McPhun, 24 Blatchf. 254; 30 Fed. Rep. 57.) Copies of depositions taken by a magistrate in such country must be certified by the United States consul there to be authenticated. (Id.) A court will take judicial notice that the charge de affaires who signed the depositions, warrants, etc., offered in evidence was the chief diplomatic officer of the country at the time. (In re Orpen, 86 Fed. Rep. 760.)

Rights of party accused.—The party proceeded against has the right to examine witnesses in his own behalf. (Re Kelley, 25 Fed. Rep. 268.) The testimony of the accused is not admissible, although the judge be sitting in a State where such evidence is admissible. (Re Dugan, 2 Low. 367; Fed. Cas. No. 4120.) The evidence may be in the form authorized in the country whence it comes, and in substance sufficient to warrant action in the country whose action is invoked. (Re Dugan, 2 Low. 367; Fed. Cas. No. 4120.) It may be open to the petitioner, when before the Canadian courts, to show that the extradition proceedings were not prosecuted in good faith. But, having been surrendered, it is not for him to raise that question before the tribunals of his own country. (Adriance v. Lagrave, 59 N. Y. 110; Dow's Case, 18 Pa. 37; Re Miller, 23 Fed. Rep. 34.) Under the Canada Extradition Statute, s. s. 3, sec. 9, the accused can only show that the offense is either a political one, or that it is not an extradition crime. The investigation cannot take the features of a trial. (Re Debaun, Can. Sup. Ct. 11 Cr. L. Mag. 47.) In order to justify the extradition from England of the subject of a foreign State, there must be evidence of an act committed by him in the foreign country,

amounting to an offense against the law of such country, and which, if committed in England, would amount to an offense against English law. (Re Bellencontre (1891), 2 Q. B. 122.) The accused cannot be admitted to bail during a continuance of the hearing on extradition. (In re Carrier, 57 Fed. Rep. 578.)

Nature of the proceedings.—Extradition proceedings do not involve in their nature the right of accused not to be prosecuted upon any other charge than that upon which his extradition is asked. (United States v. Lawrence, 13 Blatchf. 295; Fed. Cas. No. 15573; 6 Op. Atty.-Gen. 691; United States v. Caldwell, 8 Blatchf. 131; Fed. Cas. No. 14707; Adriance v. Lagrave, 59 N. Y. 110; Re Miller, 23 Fed. Rep. 33.) But one extradited from a foreign country may claim exemption from trial upon any charge other than that mentioned in the extradition proceedings; and this right cannot be waived. (Ex parte Coy, 32 Fed. Rep. 911.) The extradition proceedings are in some respects like preliminary examinations; and if it appear that a crime has been committed, and that there is probable reason to believe that defendant is guilty of that crime, substantial justice requires that he shall be put upon trial. (Re Herres, 33 Fed. Rep. 165.) Extradition is not defeated by the fact that a part of the alleged offenses named in the warrant are not extraditable if the others are. (Re Bellencontre (1891), 2 Q. B. 122.)

§ 595. **Fugitives from justice of a State or Territory.**—Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State

or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory. (Rev. Stats. sec. 5278.)

Interstate Extradition.—(See Robb v. Connolly, 111 U. S. 624.) The term "magistrate," used in this section, includes an assistant police magistrate of a city. (Kurtz v. State, 22 Fla. 36.) A person who has committed a crime in one State, and has left it, so as to be beyond the reach of process, is a fugitive from justice, regardless of his purpose in leaving. (State v. Richter, 37 Minn. 436; In re Bloch, 87 Fed. Rep. 981; In re White, 14 U. S. App. 87; 55 Fed. Rep. 54.) Extradition from one State to another can be had only when the person charged is a fugitive from the State in which the crime was committed. (State v. Jackson, 36 Fed. Rep. 258.) The words "certified to be in due form" are equivalent to "certified as authentic" in the above section. (Ex parte Dawson, 83 Fed.

Rep. 306.) An information is not the equivalent of an indictment provided for by this section; nor is the verification on belief the equivalent of an affidavit required by the section. (Ex parte Harte, 25 U. S. App. 22; 63 Fed. Rep. 249.) Under this section, affidavits filed with the governor requesting him to make a requisition, though made a part of the requisition papers, are not sufficient where the governor only certifies to the authenticity of an information and makes his demand on this. (Ex parte Harte, 25 U. S. App. 22; 63 Fed. Rep. 249.)

§ 596. **Penalty for resisting agent, etc.**—Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year. (Rev. Stats. sec. 5279.)

Review on habeas corpus.—The Federal and State courts have concurrent jurisdiction in extradition proceedings. (Ex parte Brown, 28 Fed. Rep. 653; Re Roberts, 24 Fed. Rep. 132.) And the question of lawful arrest of a person as a fugitive from justice from a State may be inquired into by either a Federal or a State court. (Roberts v. Reilly, 116 U. S. 80; Ro Doo Woon, 18 Fed. Rep. 898.) A writ of habeas corpus in a case of extradition cannot perform the office of a writ of error. (Willis v. Bayles, 105 Ind. 363; State v. Neel, 48 Ark. 283; Ex parte Boennenghausen, 21 Mo. App. 267; In re Oteiza y Cortes, 136 U. S. 330; Powell v. Dayton etc. R. Co., 16 Or. 33; 8 Am. St. Rep. 251; Re Savin, 131 U. S. 267.) The court cannot investigate the question as to the guilt or in-

nocence of the defendant (Re Roberts, 24 Fed. Rep. 132); or the grade of the guilt (Re Palmer, 18 Int. Rev. Rec. 84; Fed. Cas. No. 10679). Although courts may review the decisions of executive authority in such proceedings, they will not overrule the decisions unless they are clearly satisfied that an error has been committed. (Ex parte Brown, 28 Fed. Rep. 653.) The court will not reverse the decision of the commissioner on the question of criminality of the accused. (Re Stupp, 12 Blatchf. 501; Fed. Cas. No. 13563; Re MacDonnell, 11 Blatchf. 170; Fed. Cas. No. 8772; Re Vandervelpen, 14 Blatchf. 137; Fed. Cas. No. 16844; Re Wahl, 15 Blatchf. 334; Fed. Cas. No. 17041; Re Wiegand, 14 Blatchf. 370; Fed. Cas. No. 17618.)

§ 597. Arrest of deserting seamen from foreign vessels.—On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the

dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect. (Rev. Stats. sec. 5280.)

§ 598. Power of foreign consuls over disputes between seamen.—Whenever it is stipulated by treaty or convention between the United States and any foreign nation that the consul-general, consuls, vice-consuls, or consular or commercial agents of each nation, shall have exclusive jurisdiction of controversies, difficulties, or disorders arising at sea or in the waters or ports of the other nation, between the master or officers and any of the crew, or between any of the crew themselves, of any vessel belonging to the nation represented by such consular officer, such stipulations shall be executed and enforced within the jurisdiction of the United States as hereinafter declared. But before this section shall take effect as to the vessels of any particular nation having such treaty with the United States, the President shall be sat-

isfied that similar provisions have been made for the execution of such treaty by the other contracting party, and shall issue his proclamation to that effect, declaring this section to be in force as to such nation. (Rev. Stats. sec. 4079.)

§ 599. Arrest of seamen on application of consul.—In all cases within the purview of the preceding section, the consul-general, consul, or other consular or commercial authority of such foreign nation charged with the appropriate duty in the particular case, may make application to any court of record of the United States, or to any judge thereof, or to any commissioner of a circuit court, setting forth that such controversy, difficulty, or disorder has arisen, briefly stating the nature thereof, and when and where the same occurred, and exhibiting a certified copy or extract of the shipping articles, roll, or other proper paper of the vessel, to the effect that the person in question is of the crew or ship's company of such vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of such consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States. Such application shall be in writing and duly authenticated by the consular or other sufficient official

seal. Thereupon such court, judge, or commissioner shall issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person being a citizen of the United States, whom he may specially depute for the purpose, requiring such person to be brought before him for examination at a certain time and place. (Rev. Stats. sec. 4080.)

§ 600. **Commitment and discharge.**—If, on such examination, it is made to appear that the person so arrested is a citizen of the United States, he shall be forthwith discharged from arrest, and shall be left to the ordinary course of law. But if this is not made to appear, and such court, judge, or commissioner finds, upon the papers hereinbefore referred to, a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or, in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control, and discipline of such master or chief officer, and to the jurisdiction of the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or juris-

diction in the premises of the United States or any State thereof. No person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty and shall not again be arrested for the same cause. The expenses of the arrest and the detention of the person so arrested shall be paid by the consular officers making the application. (Rev. Stats. sec. 4081.)

§ 601. **Custody of United States prisoners—Expenses to be paid by United States.**—All the expenses attendant upon the transportation from place to place, and upon the temporary or permanent confinement of persons arrested or committed under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the treasury of the United States in the manner provided by law. (Rev. Stats. sec. 5536.)

§ 602. **Places of confinement.**—In a State where the use of jails, penitentiaries, or other houses is not allowed for the imprisonment of persons arrested or committed under the authority of the United States, any marshal in such State, under the direction of the judge of the district, may hire, or otherwise procure, within the limits of such State, a convenient place to serve as a temporary jail. (Rev. Stats. sec. 5537.)

§ 603. **Marshals to make provision for safekeeping of prisoners.**—The marshal shall make

such other provision as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States, until permanent provision for that purpose is made by law. (Rev. Stats. sec. 5538.)

§ 604. **United States convicts in State penitentiaries.**—Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory. (Rev. Stats. sec. 5539.)

§ 605. **Selection of penitentiary in a divided district.**—Where a judicial district has been or may hereafter be divided, the circuit and district courts of the United States shall have power to sentence any one convicted of an offense punishable by imprisonment at hard labor to the penitentiary within the State, though it be out of the judicial district in which the conviction is had. (Rev. Stats. sec. 5540.)

§ 606. **Sentences for longer term than a year, where to be executed.**—In every case where any person convicted of an offense against the United States is sentenced to imprisonment for a period

longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose. (Rev. Stats. sec. 5541.)

§ 607. Penitentiary sentences, where to be executed.—In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose. (Rev. Stats. sec. 5542.)

Where convict imprisoned.—If the law prescribes a place of imprisonment the court cannot direct a different place not authorized (In re Bonner, 151 U. S. 242); and if the court orders imprisonment in a place not authorized by law, the prisoner is entitled to a writ of habeas corpus to relieve him from imprisonment at that place, but without prejudice to his being sentenced in accordance with law upon the verdict against him. (In re Bonner, 151 U. S. 242.) Under this and the succeeding section, the court has no power after the expiration of the term in which such sentence is imposed to order the removal of a prisoner from a State prison to a county jail. (United States v. Greenwald, 64 Fed. Rep. 6.)

§ 608. Deduction from term of imprisonment

for good conduct.—All persons who have been or may be convicted of any offense against the laws of the United States, and confined in any State jail or penitentiary in execution of the judgment upon such conviction, who so conduct themselves that no charge for misconduct is sustained against them, shall have a deduction of one month in each year made from the term of their sentence, and shall be entitled to their discharge so much the sooner, upon the certificate of the warden or keeper of such jail or penitentiary, with the approval of the attorney general. (Rev. Stats. sec. 5543.)

Note.—This section governs commutations of sentences of offenders confined in county jails. (In re Deering, 60 Fed. Rep. 265.)

§ 609. **To what prisoners to apply.**—The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but in other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any State, for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary. (Rev. Stats. sec. 5544.)

Good conduct credits.—A sentence to commence on the expiration of a preceding sentence is not uncertain because by the above section convicts are entitled to good conduct credits on their sentences. (Howard v. United States, 43 U. S. App. 678; 75 Fed. Rep. 986.) A prisoner confined in a penitentiary of New York State for an offense against the United States is not entitled to an unconditional allowance for good be-

havior, but to the same rule of credits applicable by the law of the State to other prisoners in the same penitentiary. (In re Willis, 83 Fed. Rep. 148.)

§ 610. **Credits for good conduct and on discharge, etc.**—That all prisoners who have been, or shall hereafter be, convicted of any offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any State or Territory which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison [or] penitentiary of such deduction shall be entered on the warrant of commitment; *provided,* that if during the term of imprisonment the prisoner shall commit any offense for which he shall be convicted by a jury, all remissions theretofore made shall be thereby annulled. (18 Stat. L. 479; 1 Sup. Rev. Stats. 184, sec. 1.)

§ 611. **To be provided with clothes and money on discharge.**—That on the discharge from any prison of any person convicted under the laws of the United States on indictment, he or she shall be provided by the warden or keeper of said prison with one plain suit of clothes and five dollars in money, for which charge shall be made and allowed

in the accounts of said prison with the United States; *provided*, that this section shall not apply to persons sentenced to a term of imprisonment of less than six months. (Act of March 3, 1875, 18 Stat. L. 479; 1 Sup. Rev. Stats. 184, sec. 2.)

§ 612. **Actual reasonable cost of keeping prisoners to be paid.**—Hereafter there shall be allowed and paid by the attorney general, for the subsistence of prisoners in the custody of any marshal of the United States and the warden of the jail in the District of Columbia, such sum only as it reasonably and actually cost to subsist them. And it shall be the duty of the attorney general to prescribe such regulations for the government of the marshals and the warden of the jail in the District of Columbia, in relation to their duties under this chapter, as will enable him to determine the actual and reasonable expenses incurred. (Rev. Stats. sec. 5545.)

§ 613. **Designation of penitentiary by attorney general.**—All persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a district or territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined for the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be

designated by the attorney general, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or Territory where the conviction has occurred; and if the conviction be had in the District of Columbia the transportation and the delivery shall be by the warden of the jail of that district; the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only, to be paid by the attorney general, out of the judiciary fund. But if, in the opinion of the attorney general, the expense of transportation from any State, Territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia, during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be changed in any case, when, in the opinion of the attorney general, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment; *provided, however,* that no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf.

(Rev. Stats. sec. 5546, as amended by the act of July 12, 1876, 19 Stat. L. 88.)

Prisoner, removal of.—The power of removal of a prisoner is in the hands of the attorney-general, and not in the courts. (United States v. Greenwald, 64 Fed. Rep. 6.)

§ 614. Attorney general to contract for subsistence, etc.—The attorney general shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined. (Rev. Stats. sec. 5547.)

Subsistence of prisoners.—A State statute authorizing the use of county jails for the confinement of United States prisoners on certain terms as to charges and fees is not binding on the United States, as subsistence is a matter of contract. (County of Lewis and Clarke v. United States, 77 Fed. Rep. 732.)

§ 615. Court may order sentence executed in house of correction.—Whenever any person is convicted of any offense against the United States which is punishable by fine and imprisonment, or by either, the court by which the sentence is passed may order the sentence to be executed in any house of correction or house of reformation for juvenile delinquents within the State or district where such court is held, the use of which is authorized by the legislature of the State for such purpose. (Rev. Stats. sec. 5548.)

§ 616. Confinement of juvenile offenders.—Juvenile offenders against the laws of the United States, being under the age of sixteen years, and who may hereafter be convicted of crime, the punishment whereof is imprisonment, shall be confined during the term of sentence in some house of refuge to be designated by the attorney general, and shall be transported and delivered to the warden or keeper of such house of refuge by the marshal of the district where such conviction has occurred; or if such conviction be had in the District of Columbia, then the transportation and delivery shall be by the warden of the jail of that district, and the reasonable actual expense of the transportation, necessary subsistence, and hire, and transportation of assistants and the marshal or warden, only, shall be paid by the attorney general out of the judiciary fund. (Rev. Stats. sec. 5549.)

§ 617. Attorney general to contract for their subsistence.—The attorney general shall contract with the managers or persons having control of such houses of refuge for the imprisonment, subsistence, and proper employment of all such juvenile offenders and shall give the several courts of the United States and of the District of Columbia notice of the places so provided for the confinement of such offenders; and they shall be sentenced to confinement in the house of refuge nearest the place of conviction so designated by the attorney general. (Rev. Stats. sec. 5550.)

§ 618. **Removal of prisoners in case of contagion or epidemic.**—The judge of any district court, within whose district any contagious or epidemic disease shall at any time prevail, so as, in his opinion, to endanger the lives of persons confined in the prison of such district, in pursuance of any law of the United States, may direct the marshal to cause the persons so confined to be removed to the next adjacent prison where such disease does not prevail, there to be confined until they may safely be removed back to the place of their first confinement. Such removals shall be at the expense of the United States. (Rev. Stats. sec. 4800.)

§ 620. **Indictment—Capital offenses.**—No person shall be prosecuted, tried, or punished for treason or other capital offense, willful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed. (Rev. Stats. sec. 1043.)

§ 621. **Indictment—Offenses not capital.**—No person shall be prosecuted, tried, or punished for any offense not capital, except as provided in section one thousand and forty-six, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. But this court shall not have effect to authorize the prosecution, trial, or punishment for any offense barred by the provisions of existing laws. (19 U. S. Stats. 32; 1 Sup. Rev. Stats. 204; Rev. Stats. sec. 1044.)

Offenses not capital.—This section applies to prosecutions under statutes passed since its adoption, and is general in its nature. (Adams v. Woods, 2 Cranch, 336; United States v. Mayo, 1 Gall. 397; Fed. Cas. No. 15755; United States v. Brown, 2 Low. 267; Fed. Cas. No. 14665; Johnson v. United States, 3 McLean, 89; Fed. Cas. No. 7418; United States v. Ballard, 3 McLean, 469; Fed. Cas. No. 14507; United States v. Shorey, 9 Int. Rev. Rec. 202; Fed. Cas. No. 16281; United States v. Dustin, 15 Int. Rev. Rec. 30; Fed. Cas. No. 15012.) It applies to offenses at common law committed in the District of Columbia. (United States v. Slacum, 1 Cranch C. C. 485; Fed. Cas. No. 16311; United States v. Porter, 2 Cranch C. C. 60; Fed. Cas. No. 16072; United States v. Watkins, 3 Cranch C. C. 441; Fed. Cas. No. 16649.) It runs from the time of the commission of the offense to the finding of the indictment or filing of the information (United States v. Ballard, 3 McLean, 469; Fed. Cas. No. 14507); and that although a prior indictment was found within the three years, but upon which a nol. pros. was entered. (United States v. Ballard, 3 McLean, 469; Fed. Cas. No. 14507.) The indictment may set forth the true time of the commission of the offense, and any facts which show defendant cannot avail himself of the limitation (United States v. Watkins, 3 Cranch C. C. 441; Fed. Cas. No. 16649; United States v. White, 5 Cranch C. C. 368; Fed. Cas. No. 16678); and evidence may be given even under the general issue that he fled from justice to avoid the bar of the statute. (United States v. White, 5 Cranch C. C. 368; Fed. Cas. No. 16678.) The indictment will not be quashed, although it appears upon the record that the offense was committed more than three years before its finding (United States v. White, 5 Cranch C. C. 368; Fed. Cas. No. 16678; United States v. Cook, 17 Wall. 168); nor will judgment be arrested for that reason. (United States v. Cook, 17 Wall. 168.) The defense

cannot be set up by demurrer. (United States v. Cook, 17 Wall. 168; but see contra, United States v. Watkins, 3 Cranch C. C. 441; Fed. Cas. No. 16649; United States v. White, 5 Cranch C. C. 368; Fed. Cas. No. 16678.) A party is entitled to the benefit of the limitation although the government does not know him to be the person who committed the crime (United States v. White, 5 Cranch C. C. 368; Fed. Cas. No. 16678), and although he committed the crime on the high seas and did not return until the three years had expired. (United States v. Brown, 2 Low. 267; Fed. Cas. No. 14665.) It is not necessary to plead the statute specially; it may be taken advantage of under the plea of not guilty. (United States v. Cook, 17 Wall. 168; United States v. Fermenting Tubs, 1 Abb. U. S. 268; Fed. Cas. No. 16296; United States v. White, 5 Cranch C. C. 368; Fed. Cas. No. 16678; United States v. Brown, 2 Low. 267; Fed. Cas. No. 14665; Parsons v. Hunter, 2 Sum. 419; Fed. Cas. No. 10778.) If a public officer embezzles public funds the offense is within the provisions of this section (United States v. Cook, 17 Wall. 168); but an offense arising under the revenue laws is not within its provisions (United States v. Hirsch, 100 U. S. 33); but a plea of the lapse of three years is good to an indictment for a conspiracy, although the overt act necessary to the offense may be one affecting the revenue. (United States v. Hirsch, 100 U. S. 33; United States v. Blunt, 7 Chic. L. N. 258; Fed. Cas. No. 14615; but see United States v. Fehrenback, 2 Woods, 175; Fed. Cas. No. 15083; United States v. Dustin, 15 Int. Rev. Rec. 30; Fed. Cas. No. 15012.) Fraudulently procuring one's name to be entered on the pension roll is a commission of the offense every time he claims his pension. (United States v. Coggin, 3 Fed. Rep. 492; 9 Biss. 416.) If a pensioner makes demand on an agent for his pension more than two years before the prosecution this section is a bar. (United States v. Irvine, 98 U. S. 450.)

§ 622. **Fleeing from justice.**—Nothing in the two preceding sections shall extend to any person fleeing from justice. (Rev. Stats. sec. 1045.)

Fleeing from justice.—Fleeing from justice means leaving one's home or abode to avoid detection for some offense against the United States. (United States v. O'Brian, 3 Dill. 381; Fed. Cas. No. 15908.) It is not necessary that there should be an intent to avoid the justice of the United States; but it is sufficient if there is an intent to avoid the justice of the State having criminal jurisdiction over the same territory and the same act. (Streep v. United States, 160 U. S. 128.) After flight, an open and public return more than three years before indictment bars the prosecution (United States v. White, 5 Cranch C. C. 38; Fed. Cas. No. 16675), either by leaving the jurisdiction or concealing one's self within it. (United States v. White, 5 Cranch C. C. 38; Fed. Cas. No. 16675.) If one flees to avoid punishment the statute is no bar, though he did not flee to avoid process. (United States v. White, 5 Cranch C. C. 38; Fed. Cas. No. 16675; United States v. White, 5 Cranch C. C. 116; Fed. Cas. No. 16677.) Continuing on a cruise after commission of the crime is not a fleeing from justice. (United States v. Brown, 2 Low. 267; Fed. Cas. No. 14665.)

§ 623. **Crimes under the revenue laws.**—No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime. (Rev. Stats. sec. 1046.)

Offenses against revenue laws.—This section does not embrace every law of fines or forfeiture. (United

States v. Mayo, 1 Gall. 397; Fed. Cas. No. 15755.) The term "revenue laws" does not mean laws which, by indirect operation, may conduce to the public wealth. (United States v. Norton, 91 U. S. 566; United States v. Mayo, 1 Gall. 397; Fed. Cas. No. 15755.) But it applies to special acts violating laws made to protect the revenue. (United States v. Hirsch, 100 U. S. 33.) As making a false entry of goods by a fraudulent invoice and false classification. (United States v. Hirsch, 100 U. S. 33.) Or to a crime created by a statute relating to the internal revenue. (United States v. Wright, 11 Int. Rev. Rec. 35; Fed. Cas. No. 16770; United States v. Dustin, 15 Int. Rev. Rec. 30; Fed. Cas. No. 15012.) Nor is the act to establish a money-order system. (United States v. Norton, 91 U. S. 566.) Offenses against the customs are crimes punishable by fine and imprisonment, forfeitures carried into effect by seizure, condemnation and sale, and pecuniary penalties recoverable by action. (In re Landsberg, 11 Int. Rev. Rec. 150; Fed. Cas. No. 8041.) But not if a statute provides for fine or imprisonment, or both, at the discretion of the court. (In re Landsberg, 11 Int. Rev. Rec. 150; Fed. Cas. No. 8041; United States v. Shorey, 9 Int. Rev. Rec. 202; Fed. Cas. No. 16281; McGlinchy v. United States, 4 Cliff. 312; Fed. Cas. No. 8803; Perkins v. United States, 4 Cliff. 321; Fed. Cas. No. 10990; United States v. One Oil Painting, 31 Fed. Rep. 881.

§ 624. **Penalties and forfeitures under laws of United States.**—No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued; *provided*, that the

person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted, and served against such person or property. (Rev. Stats. sec. 1047.)

Note.—It applies equally to an action of debt to recover a penalty. (Adams v. Woods, 2 Cranch, 336; Stimpson v. Pond, 2 Curt. 502; Fed. Cas. No. 13455.) It applies to civil actions and not to prosecutions for the crime. (United States v. Brown, 2 Low. 267; Fed. Cas. No. 14665.) It does not apply to actions on a bond, or for the penalty named in the bond. (Raymond v. United States, 14 Blatchf. 51; Fed. Cas. No. 11596.) A State statute cannot bar an action arising under an act of Congress. (McGlinchy v. United States, 4 Cliff. 312; Fed. Cas. No. 8803; Perkins v. United States, 4 Cliff. 321; Fed. Cas. No. 10990.) "Penalty" is a fixed pecuniary mulct incurred for violation of a law. (In re Landsberg, 11 Int. Rev. Rec. 150; Fed. Cas. No. 8041.) And the limitation applies to suits to recover such penalty, as well as fines and forfeitures accruing under the laws of the United States, and those accruing to the United States unless specifically excepted (United States v. Maillard, 4 Ben. 459; Fed. Cas. No. 15709; In re Landsberg, 11 Int. Rev. Rec. 150; Fed. Cas. No. 8041), whether the action be in rem or in personam (The Boston, 3 Fed. Rep. 807); as for refusal of a master to deposit papers with the consul (Parsons v. Hunter, 2 Sum. 419; Fed. Cas. No. 10778), and a fraudulent concealment of the cause of action will not prevent the running of the statute. (United States v. Maillard, 4 Ben. 459; Fed. Cas. No. 15709.) Five years from the time "when the penalty or forfeiture accrued" is the limitation for actions of debt for penalties. (Hatch v. The Boston,

3 Fed. Rep. 810.) A statute imposing a penalty for the master's refusal or neglect to deposit papers with the consul is not a revenue law. (Parsons v. Hunter, 2 Sum. 419; Fed. Cas. No. 10778.) Under this clause a right to forfeit the charter of a national bank for violation of the provisions of U. S. Rev. Stat., tit. 62, is limited to five years. (Welles v. Graves, 7 R. R. & Corp. L. J. 392; 41 Fed. Rep. 459.)

§ 625. **Under customs revenue law.**—That no suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued; *provided*, that the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation. (Rev. Stats. sec. 1047.)

§ 626. **Parties beyond reach of process during the rebellion.**—In all cases where, during the late rebellion, any person could not, by reason of resistance to the execution of the laws of the United States, or of the interruption of the ordinary course of judicial proceedings, be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which such person was beyond the reach of legal process shall not be taken as any part of the time limited by law for the commencement of such action. (Rev. Stats. sec. 1048.)

Suspension of operation of statute.—A State law may suspend the operation of the statute for a longer period. (Graydon v. Sweet, 1 Woods, 418; Fed. Cas. No. 5733.) This statute is not a statute of limitations, not specifying the time in which action may be brought. (Graydon v. Sweet, 1 Woods, 418; Fed. Cas. No. 5733.) If defendant was where process could be served on him, the limitation in other cases applies. (Britton v. Butler, 11 Blatchf. 350; Fed. Cas. No. 1904.) The suspension of the statute ceased a reasonable time after restoration of peace. (United States v. Muhlenbrink, 1 Woods, 569; Fed. Cas. No. 15831.) All the time must be deducted during which suits could not be prosecuted, by resistance to laws or interruption to judicial proceedings, whether before or after its passage. (United States v. Wiley, 11 Wall. 508.) It does not apply between persons who resided in the Confederate States. (Lockhart v. Horn, 1 Woods, 628; Fed. Cas. No. 8445.)

CHAPTER XXIII.

COURT OF CLAIMS—ORGANIZATION AND SESSIONS.

§ 627. Judges.
§ 628. Seal.
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§ 627. **Judges.**—The court of claims, established by the act of February twenty-four, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the constitution of the United States, and to discharge faithfully the duties of his office, and shall be entitled to receive an annual salary of four thousand five hundred dollars, payable quarterly from the treasury. (Rev. Stats. sec. 1049.)

§ 628. **Seal.**—The court of claims shall have a seal, with such device as it may order. (Rev. Stats. sec. 1050.)

§ 629. **Courtrooms, etc., how provided.**—It shall be the duty of the speaker of the House of Representatives to appropriate such rooms in the Capitol, at Washington, for the use of the court of claims, as may be necessary for their accommodation, unless it appears to him that such rooms cannot be so appropriated without interfering with the business of Congress. In that case the court shall procure, at the city of Washington, such rooms as may be necessary for the transaction of their business. (Rev. Stats. sec. 1051.)

§ 630. **Sessions — Quorum.**—The court of claims shall hold one annual session, at the city of Washington, beginning on the first Monday in December, and continuing as long as may be necessary for the prompt disposition of the business of the court. And any three judges of the court of claims shall constitute a quorum; *provided*, that the concurrence of three judges shall be necessary to the decision of any case. (Rev. Stats. sec. 1052; 18 U. S. Stats. 252.)

§ 631. **Officers of the court.**—The said court shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session. The bailiff

shall hold his office for a term of four years, unless sooner removed by the court for cause. (Rev. Stats. sec. 1053.)

§ 632. **Salaries of clerks, etc.**—The salary of the chief clerk shall be three thousand dollars a year, of the assistant clerk, two thousand a year, of the bailiff, fifteen hundred dollars a year, and of the messenger eight hundred and forty dollars a year, payable quarterly from the treasury. (Rev. Stats. sec. 1054.)

§ 633. **Clerk's bond.**—The chief clerk shall give bond to the United States in such form, and with such security as shall be approved by the secretary of the treasury. (Rev. Stats. sec. 1055.)

§ 634. **Contingent fund.**—The said clerk shall have authority, when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the treasury in the same way as the account of other disbursing agents of the government are settled. (Rev. Stats. sec. 1056.)

§ 635. **Reports to Congress, copies for departments, etc.**—On the first day of every December session of Congress, the clerk of the court of claims shall transmit to Congress a full and complete statement of all the judgments rendered by the

court during the previous year, stating the amounts thereof, and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. And at the end of every term of the court he shall transmit a copy of its decisions to the heads of departments; to the solicitor, the comptrollers, and the auditors of the treasury; to the commissioners of the general landoffice and of Indian affairs; to the chiefs of bureaus; and to other officers charged with the adjustment of claims against the United States. (Rev. Stats. sec. 1057.)

§ 636. **Members of Congress.**—Members of either house of Congress shall not practice in the court of claims. (Rev. Stats. sec. 1058.)

CHAPTER XXIV.

COURT OF CLAIMS—JURISDICTION.

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§ 637. Jurisdiction — Suits against government.—The court of claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the constitution of the United States, or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable; *provided, however*, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on ad-

versely by any court, department, or commission authorized to hear and determine the same. (Rev. Stats. sec. 1059, as amended; 24 U. S. Stats. 505, sec. 1, cl. 1.)

Jurisdiction in general.—The court of claims is not a local but a national court, with jurisdiction throughout the United States. (King's Case, 27 Ct. of Cl. 529.) Where Congress creates a class of claims and provides a jurisdiction it is exclusive. (Foster's Case, 32 Ct. of Cl. 170.) Congress can confer upon the court of claims power not strictly judicial. (Western Cherokee Indians' Case, 27 Ct. of Cl. 1.) The court of claims has no general jurisdiction over claims against the United States; it can take cognizance of only those matters which by the terms of some act of Congress are committed to it. (Johnson v. United States, 160 U. S. 546.) Where Congress has provided a system adequate to the investigation and recovery of legal claims, and has intrusted specified executive or other officers with a judicial discretion, such claims cannot be enforced in the court of claims (Boughton v. United States, 12 Ct. of Cl. 330); and if a claimant institutes proceedings without presenting his claim to an executive department, he may be required to do so before relief will be granted (Sweeney v. United States, 5 Ct. of Cl. 285); but he cannot be required so to do before filing his petition. (Clyde v. United States, 13 Wall. 38; but see Calkins v. United States, 1 Ct. of Cl. 382.) If the government assumes to pay a certain claim, and provides a specific tribunal for the ascertainment thereof, the claimant cannot prosecute in the court of claims after the decision of that tribunal. (Meade v. U. S., 9 Wall. 691.) Where the government recognizes an assignment of the claim, the parties to the agreement and those claiming under them cannot set up that the contract was not assignable. (Goodman v. Niblack, 102 U. S. 556.)

The court of claims has no equitable jurisdiction. (Bonner v. United States, 9 Wall. 156.) An action to implead the United States and a State cannot be prosecuted in the court of claims. (Mil. & R. R. Canal Co. v. United States, 1 Ct. of Cl. 187.) Plaintiff, who has instituted proceedings in the court of claims to recover for lands condemned for public purposes, cannot then be heard to say that the law establishing the court is unconstitutional because it takes away the right of trial by jury and establishes a court unknown to the Constitution. (Great Falls Manuf. Co. v. Attorney-general, 124 U. S. 581; affirming S. C. 25 Fed. Rep. 521.) The jurisdiction of the court of claims over cases referred to it by either house of Congress is subject to provisions of general statutes of limitation regulating that jurisdiction. (Ford v. United States, 116 U. S. 213.) This court has jurisdiction of an action by a State against the United States, for a demand arising upon an act of Congress. (United States v. Louisiana, 123 U. S. 32.) The court of claims has not jurisdiction of a suit in equity to set aside a sale of land to the United States on the ground that it was in fraud of the rights of the present claimants. (Jackson's Case, 27 Ct. of Cl. 74.) Where the government has taken property avowedly as its own the court of claims has no jurisdiction. (Merriam's Case, 29 Ct. of Cl. 250.) A claim before the Southern claims commission, prosecuted only by ex parte affidavits, is excluded from the jurisdiction of the court of claims. (Duplantier's Case, 27 Ct. of Cl. 323.) When a citizen insists upon a recognition of a claim, he imposes a legal obligation upon himself to become subject to the jurisdiction of such court as Congress may empower to adjudicate it. (La Abra Case, 29 Ct. of Cl. 432.) The court of claims has jurisdiction to recover a drawback on exported sugar. (Durant's Case, 28 Ct. of Cl. 356.) An act of Congress providing a method of adjusting a claim, if the claimant so

desire, without a suit, does not deprive the court of claims of its jurisdiction of the claim, if within its general jurisdiction. (Smithmeyer v. United States, 147 U. S. 342.) The jurisdiction of the court of claims to proceed further in a case founded upon a statute is taken away by the repeal of the act after a reversal of the judgment of the court and the remanding of the case for further proceedings. (In re Hall, 167 U. S. 38.) The refusal of the court to approve the account of a commissioner is no bar to an action therefor in the court of claims, although such refusal may be a matter for consideration in respect at least to the good faith of the transaction. (Southworth v. United States, 151 U. S. 179.)

Law of Congress.—A claim founded on a law of Congress may be prosecuted in the court of claims. (Alive v. United States, 1 Ct. of Cl. 233; Bogert v. United States, 3 Ct. of Cl. 18.) An officer may prosecute a claim to recover salary allowed by act of Congress. (Moore v. United States, 4 Ct. of Cl. 139.) The owner of bonds assumed by the United States may maintain an action thereon in the court of claims (Morrell v. U. S., 7 Ct. of Cl. 421); but a person who has attended as a witness before either house of Congress cannot prosecute an action to recover compensation. (Lilley v. U. S., 14 Ct. of Cl. 539.) So a pension agent cannot prosecute when there is no provision of law for his compensation. (Kapp v. U. S., Dev. Ct. Cl. 132.) Although an unauthorized purchase is ratified by Congress, yet an action in the court of claims for rent from time of purchase to time of ratification cannot be maintained. (Carpenter v. U. S., 17 Wall. 489; S. C., 6 Ct. of Cl. 18.) So if the United States take possession of land, under an Indian treaty, and as trustee for the Indians, the owner cannot prosecute an action to recover compensation in court of claims. (Langford v. U. S., 12

Ct. of Cl. 338.) Where, by an act of Congress, the secretary of the treasury is required to pay a certain claim against the United States. and no discretion in the premises is vested in him, the claimant is entitled to payment, and no suit lies to recover back the amount when paid, on the ground of mistake, unless Congress abrogates the law under which payment was made. (United States v. Price, 116 U. S. 43.) Neither the court of claims nor the supreme court of the United States can determine any claim against the United States, except in cases defined by Congress. (United States v. Gleeson, 124 U. S. 255; De Groot v. United States, 5 Wall. 419.) Claims against or liens upon property of the United States are incapable of enforcement, except when such property becomes subject to the control of the courts. (The Siren v. United States, 7 Wall. 152.) The court of claims has jurisdiction of an action by a state against the United States for a demand arising upon an act of Congress. (United States v. Louisiana, 123 U. S. 32.)

Revenue Laws.—An officer of the internal revenue may prosecute a claim to recover his salary. (Patton v. U. S., 7 Ct. of Cl. 362.) An informer may prosecute his claim to recover his share of a forfeiture (Shelton v. U. S., 8 Ct. of Cl. 487), but not if the secretary of the treasury has decided against his claim (Ramsey v. U. S., 14 Ct. of Cl. 367); but if the money has been conveyed into the treasury, he may prosecute an action to recover his share. (Bradley v. U. S., 12 Ct. of Cl. 578.) An importer cannot prosecute to recover money paid as a duty on imported goods, although the assessment was illegal (Nichols v. United States, 7 Wall. 122; Doherty v. U. S., 6 Ct. of Cl. 901; De Celis v. U. S., 13 Ct. of Cl. 117); but he may prosecute to recover money deposited by him in excess of the duties on goods received. (Broulatour

v. U. S., 7 Ct. of Cl. 555.) A manufacturer who has paid the tax imposed by the internal revenue cannot prosecute to recover the drawback allowed upon exportation of the goods (Portland Co. v. U. S., 5 Ct. of Cl. 441); a manufacturer of matches may prosecute to recover the commission on stamps. (Daily v. U. S., 7 Ct. of Cl. 383.) A distiller cannot prosecute to recover an allowance for leakage (Turner v. U. S., 9 Ct. of Cl. 307); but a brewer may maintain an action for an excess on the payment of a special tax. (U. S. v. Kaufman, 96 U. S. 567; U. S. v. Real Est. Sav. Bk., 104 U. S. 728.) A person who never attempts to perform his contract cannot prosecute a claim against the United States upon the ground that a different mode of inspection was adopted after the making of the contract. (Spicer v. U. S., 1 Ct. of Cl. 316.) The court of claims has jurisdiction of a petition by an assessor of internal revenue to recover money deposited by him to secure the compromise of a prosecution, if the compromise is rejected, and the money conveyed into the treasury. (Boughton v. U. S., 12 Ct. of Cl. 330.) An exporter entitled to a drawback may maintain suit therefor. (Campbell v. U. S., 107 U. S. 407.) The allowance, by the commissioner of internal revenue, of a claim for taxes illegally or erroneously collected, may be used as the basis of an action in the court of claims. (U. S. v. Real Estate Sav. Bank of Pittsburg, 104 U. S. 728; see Campbell v. United States, 107 U. S. 407.)

Department regulations.—"Regulations of an executive department" describe rules and regulations made by the head of the department, under an act of Congress, and an order assigning a clerk to duty is not such a regulation. (Harvey v. U. S., 3 Ct. of Cl. 38.)

Contracts express or implied.—The United States is not liable on a contract where the officer made it

without authority, unless ratified, or the benefits were received. (De Celis v. U. S., 13 Ct. of Cl. 117.) An implied contract cannot arise out of acts of an agent who had no power or authority to contract. (Pitcher v. U. S., 1 Ct. of Cl. 7.) To constitute an implied contract there must be a consideration moving to the United States, or they must have received benefits from the property, or claimant must have a lawful right to the property. As in case of money paid by mistake. (Knote v. U. S., 95 U. S. 149.) So where the United States receives money through the fraud of their agent. (U. S. v. State, 96 U. S. 30.) So the owner of land sold for the direct tax may prosecute an action in the court of claims to recover the surplus. (Taylor v. U. S., 14 Ct. of Cl. 339.) A claim based upon an implied promise to repay money erroneously exacted is within the provisions of this section. (Schlesinger v. U. S., 1 Ct. of Cl. 16.) A claim for salvage services may be prosecuted in the court of claims (Brynn v. U. S., 6 Ct. of Cl. 128), or for delivery of goods, though the original contract made by another person was void. (Heathfield v. U. S., 8 Ct. of Cl. 213.) The owner of land may prosecute a claim for compensation for the use thereof. (Johnson v. U. S., 4 Ct. of Cl. 248.) The court of claims cannot render judgment for recovery on a military land warrant against the government (U. S. v. Alire, 6 Wall. 573; Chamberlain v. U. S., 20 Law Rep. 631; Jewett v. U. S., 23 Law Rep. 633): and although the United States disposes of land in violation of a trust, yet the holder of the warrant cannot enforce a claim arising from such breach. (Bonner v. U. S., 9 Wall. 156.) When the government is liable on contract this court alone has jurisdiction. (Case v. Terrell, 11 Wall. 199; Gibbons v. U. S., 8 Wall. 269.) It lies on an implied contract for services, equipment, and manning of a

vessel in the service of governments (U. S. v. Russell, 13 Wall. 623), but not in case of impressment of a vessel. (U. S. v. Kimbal, 13 Wall. 636.) Where property is taken for public use the government is under an implied obligation to make compensation therefor. (U. S. v. Great Falls M. Co., 112 U. S. 645.)

Damages.—A patentee cannot maintain an action of damages for the infringement of a patent; so held where the warden of a penitentiary infringed the patent and paid the proceeds from the sale of the articles made to the United States (Fletcher v. U. S., 11 Ct. of Cl. 748); but the government may be sued for the use of a patented invention (Jones v. Campbell, 3 Ct. of Cl. 446; McKeever v. U. S., 14 Ct. of Cl. 396), or for the royalty which the government agrees to pay for its use. (U. S. v. Burns, 12 Wall. 246.) If the United States leases a piece of property, a claim for damages arising after the execution of the lease from the want of reasonable care in the use may be maintained in the court of claims. (U. S. v. Bostwick, 94 U. S. 53.) So a party who suffers loss from the refusal of government to accept goods according to contract may recover (Gibbons v. U. S., 8 Wall. 269); but the court of claims cannot try cases for merely nominal damages on breach of contract. (Grant v. U. S., 7 Wall. 331.) The court of claims has jurisdiction to entertain a claim for compensation for the use of a patented invention, upon an implied contract. (United States v. Palmer, 128 U. S. 262.) But an inventor in the government service, who allows the government to test his invention and bring it into practical use at its own cost before he applies for a patent, cannot claim an implied contract to pay him for its use. (Gill v. U. S., 25 Ct. of Cl. 415.) Where a claim for use of a patent has never been submitted to the government, or any pay for it asked, the fact that officers of the government have made unauthor-

ized use of the invention does not create an implied contract within the jurisdiction. (Forehand v. U. S., 17 Wash. L. R. 37.) Where an employee devises an improvement and perfects the invention during working hours, the government paying all expenses and taking out the patent, no contract for royalty can be implied. (McAleer v. U. S., 25 Ct. of Cl. 238.) The infringement of a patent is not the taking of private property for public use, in the sense of the Constitution; and the court of claims has no jurisdiction of a claim for infringement on that ground. (Forehand v. U. S., Ct. of Cl., 17 Wash. L. R. 37.)

Torts.—No demand founded on a tort can be prosecuted in the court of claims. (German Bank v. United States, 148 U. S. 573; Schillinger v. United States, 155 U. S. 162; Gibbons v. U. S., 8 Wall. 269; Gibson's Case, 29 Ct. of Cl. 18.) As a claim for damage to a building prior to the lease thereof (U. S. v. Bostwick, 94 U. S. 53); or for a loss arising from an arrest and false imprisonment (Spicer v. U. S., 1 Ct. of Cl. 316); or for damages by bombardment of a town (Perrin v. U. S., 12 Wall. 315); or for damages from a collision with a United States vessel (Dennis v. U. S., 2 Ct. of Cl. 210); or for the wrongful diversion of the proceeds of land by a State (M. & R. R. Canal Co. v. U. S., 1 Ct. of Cl. 187); or for taking possession of land by the government, by force, under a claim of title (Langford v. U. S., 101 U. S. 341); or for damages for impairing a navigable waterway (Gibson's Case, 29 Ct. of Cl. 18); or for the wrongful use of a patent (Schillinger v. United States, 155 U. S. 163; United States v. Berdan Fire Arms Mfg. Co., 156 U. S. 552); or for the faulty construction of a dam. (Haywards' Case, 30 Ct. of Cl. 219.) So if an officer after terminating a contract compels the contractor to perform it, the latter cannot prosecute for an additional offense above that stipulated. (Gibbons v. U.

S., 8 Wall. 269.) The court of claims has no jurisdiction of a case growing out of an appropriation of property by the army or navy (Slawson v. U. S., 16 Wall. 310; Filor v. U. S., 9 Wall. 45); or for its destruction by the army or navy (Pugh v. U. S., 13 Wall. 633); or for injuries to a vessel by tortious acts of an officer. (Morgan v. U. S., 14 Wall. 531.) A claim cannot be maintained against the United States for indemnity on account of a judgment against the plaintiff in an action sounding in tort for acts done by him as an agent of the government. (Carpenter v. United States, 45 Fed. Rep. 341.) "Damages in cases not sounding in tort"—that is to say, damages for breach of contract—have already been held to be recoverable against the government under the former acts. (United States v. Behan, 110 U. S. 338; United States v. Great Falls Mfg. Co., 112 U. S. 645; Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 67; United States v. Jones, 131 U. S. 1.) "A claim," in a just juridical sense, is a demand of some matter, as of right made by one person upon another, to do or to forbear to do some act or thing, as a matter of duty. (Prigg v. Pennsylvania, 16 Pet. 539.) Cases sounding in tort cannot be brought against the United States, under the act of Congress of March 3, 1887. (Carpenter v. United States, 42 Fed. Rep. 264; German Bank v. United States, 148 U. S. 573; Schillinger v. United States, 155 U. S. 163.)

Claims reported on adversely.—This proviso, excluding from the jurisdiction of the courts therein mentioned claims "which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same," applies only to claims which have been adjudicated by a court, department, or commission authorized to determine between the parties, and not to claims which have been rejected in the ordi-

nary process of presentation. (Stanton v. United States, 37 Fed. Rep. 252. Contra, Bliss v. United States, 34 Fed. Rep. 781; Rand v. United States, 36 Fed. Rep. 671. See Ward v. United States, 10 Wall. 593.)

War claims excluded.—A claim for the seizure and appropriation of a railroad during the war by military authorities of the United States, without the assent of the owner, and without any understanding that compensation was to be made, is a war claim, excluded from the jurisdiction of the court of claims. (United States v. Winchester & P. R. Co., 163 U. S. 244.) The certification of a war claim by an executive department to the court of claims under United States Revised Statutes, section 1063, cannot give the court jurisdiction. (United States v. Winchester & P. R. Co., 163 U. S. 244.)

§ 638. Set-offs, counterclaims, etc.—Proviso—Limitations.—Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Governmentof the United States against any claimant against the Government in said court; *provided,* that no suit against the Government of the United States shall be allowed under this act, unless the same shall have been brought within six years after the right accrued for which the claim is made; *provided, further,* that no suit, against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this Act, unless an account for said fees shall have been rendered and finally acted upon accord-

ing to the provisions of the Act of July 31, 1894 (chapter 174, 28th Statutes at Large, page 162), unless the proper accounting officer of the treasury fails to finally act thereon within six months after the account is received in said office. (Rev. Stats. sec. 1059, as amended; 24 U. S. Stats. 505, sec. 1. cl. 2; 30 U. S. Stats. 494, sec. 1; 30 U. S. Stats. 649.)

Note.—A claim against the United States is barred within six years after suit could be commenced thereon against the government. (Finn v. United States, 123 U. S. 227.) Amendments to a petition are always proper, as against the statute of limitations, when no new cause of action is introduced, although the original petition embraced the claim only by general allegations. (Buck v. United States, 25 Ct. of Cl. 120.)

Set-off and counterclaim.—Demands of every kind, whether liquidated or unliquidated, may be set off against a claimant (Allen v. United States, 17 Wall. 207); as the amount due by a surety on a bond (McKnight v. United States, 98 U. S. 179); or a claim against an insolvent debtor for the proceeds of bonds unlawfully converted by him (Allen v. United States, 17 Wall. 207); or an assigned claim of a judgment debtor (Macauley v. United States, 11 Ct. of Cl. 693); or a claim for an internal revenue tax. (Roman v. United States, 11 Ct. of Cl. 761.) Where a setoff is pleaded in a suit brought by the United States, the refusal to direct the jury to certify the amount due will not be reviewed. (Schaumburg v. United States, 103 U. S. 667.) Verdict where a setoff in United States is in excess of the claim sued for (Schaumburg v. United States, 103 U. S. 667), the amount due from an officer for an income tax will not be deducted from

his salary. (Jones v. United States, 4 Ct. of Cl. 197.) If no attempt is made to deduct the tax on the property, it cannot, after judgment, be deducted by the secretary of the treasury. (United States v. O'Grady, 22 Wall. 641.) It is the duty of the treasury department, through the accounting officers, to settle all claims and demands by and against the United States, and in proper cases to set off one against the other, when the government is both debtor and creditor of the same party. (Howes v. United States, 24 Ct. of Cl. 170.) Where an officer, after settlement with the government, sues it in the court of claims for back pay, it may recover against him moneys improperly paid to him before the settlement, which it has pleaded as a setoff. (McElrath v. United States, 102 U. S. 426.) An overpayment made to a former railroad company before the property passed by purchase to the present claimant, and before contract relations existed between the government and the present claimant, cannot be set up by way of counterclaim. (Duval v. United States, 25 Ct. of Cl. 46.) A substantive, independent claim cannot be recovered by a defendant from the State, by way of setoff, any more than by direct suit. (Commonwealth v. Matlack, 4 Dall. 303.) A claim which has never been filed in the interior department does not come within the category of claims provided for in the second clause of the above act. (Johnson v. United States, 160 U. S. 546.)

Judgment.—The only judgment the court of claims can render against the government is one for money found due to the claimant. (United States v. Alire, 6 Wall. 573; United States v. Anderson, 9 Wall. 56; Brown v. United States, 6 Ct. of Cl. 171.) If the proceeds of claimant's property is intermingled with that of other property, he is entitled to only his proportionate share of the mass (Sharp v. United States, 12

Ct. of Cl. 638); and when the fund vanishes the jurisdiction of the court is at an end. (Thomas v. United States, 12 Ct. of Cl. 273; Sharp v. United States, 12 Ct. of Cl. 638.) Under the act of March 3, 1887, the court has power to render judgment in favor of the United States for any balance which may be found due them upon any setoff or counterclaim. (United States v. Saunders, U. S. App., 79 Fed. Rep. 407.) Although there is an error in a judgment in favor of a prior claimant for a part of the mass, the claimant is entitled to his full share. (Winchester v. United States, 99 U. S. 372; Sevier v. United States, 7 Ct. of Cl. 388.) A person who has paid a fine under sentence of a military commission organized in a State where the courts were open may prosecute an action to recover the money. (Devlin v. U. S., 12 Ct. of Cl. 266.) That the only judgment which is authorized is a money judgment, see Case v. Terrell, 11 Wall. 199; 20 L. Ed. 134; United States v. Jones, 131 U. S. 1. The court of claims cannot allow mere extra allowances where there is no promise to that effect, either express or implied. (Hawkins v. United States, 96 U. S. 689.) A judgment will be allowed to stand if an error can be corrected by the claimant's remitting a part. (Tully's Case, 32 Ct. of Cl. 1.) The circuit court has no jurisdiction to award interest on a judgment which was rendered by the court of claims without making provision for interest; the court of claims is the proper forum for the determination of the question of jurisdiction. (Walton v. United States, 61 Fed. Rep. 486; Bunton v. United States, 62 Fed. Rep. 171.) Where three suits against three tribes of Indians have been united in one case without objection, several judgments must be entered. (Barrow Porter & Co.'s Case, 30 Ct. of Cl. 54.)

§ 639. **Concurrent jurisdiction.**—The district courts of the United States shall have concurrent

jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All cases brought and tried under the provisions of this act shall be tried by the court without a jury. The jurisdiction hereby conferred upon the said circuit and district courts shall not extend to cases brought to recover fees, salary or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof. (24 U. S. Stats. 505, sec. 2; as amended, 30 U. S. Stats. 495.)

Note.—Act of March 3, 1887, to provide for bringing suits against the government does not authorize equitable relief by suits for specific performance to compel the issue and delivery of a patent for land. (United States v. Jones, 131 U. S. 1; U. S. v. Alire, 6 Wall. 573; Bonner v. U. S., 9 Wall. 156; U. S. v. Gillis, 95 U. S. 407; U. S. v. Schurz, 102 U. S. 378.) The above section does not authorize the courts to entertain a petition to cancel a judgment lien alleged to have been unlawfully placed upon the property of the petitioners by an officer of the United States in an attempt to enforce a judgment recovered by the United States. (Holmes v. United States, 78 Fed. Rep. 513. See, generally, United States v. Saunders, U. S. App., 79 Fed. Rep. 407; McDonald v. United States, 66 Fed. Rep. 255.)

§ 640. **Release from official bond.**—Whenever any person shall present his petition to the court of claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the attorney-general of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. (24 U. S. Stats. 505, sec. 3, cl. 1.)

Note.—The jurisdiction given by the above section does not authorize a judgment against the government. (Gerding's Case, 28 Ct. of Cl. 531.)

§ 641. **Attorney-general to represent United States.**—The attorney-general shall represent the

United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court, or of the supreme court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. (24 U. S. Stats. 505, sec. 3, cl. 2.)

§ 642. **Payment, discharge of obligation.**—The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. (24 U. S. Stats. 505, sec. 3, cl. 3.)

§ 643. **Jurisdiction and procedure.**—The jurisdiction of the respective courts of the United States proceeding under this Act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt. (24 U. S. Stats. 505, sec. 4.)

§ 644. Petition for settlement of claims.—The plaintiff in any suit brought under the provisions of the second section of this Act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law. (24 U. S. Stats. 505, sec. 5.)

Petition.—A petition is both process and declaration. Its defects as a declaration do not nullify it as a process. As a declaration it is a subject of amendment. (Duran's Case, 31 Ct. of Cl. 353.)

§ 645. Service of petition — Answer.—The plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the attorney-general of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be

extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the government, and to file a notice of any counterclaim, setoff, claim for damages, or other demand or defense whatsoever of the government in the premises; *provided*, that should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. (24 U. S. Stats. 505, sec. 6.)

§ 646. **Findings and opinion.**—It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts. (24 U. S. Stats. 505, sec. 7.)

Findings.—The findings of a court of claims in an action at law determine all matters of fact precisely as the verdict of a jury. (Stone v. United States, 164 U. S. 380.) The findings of the court of claims transmitted to a department in a case previously transmitted by the court's decision is not a judgment which is appealable to the supreme court. (In re Sanborn, 148 U. S. 222.) The findings in Congressional cases are not intended to present to Congress legal

questions for judicial determination. They should be so framed as to cause no misunderstanding in Congress as to the legal or equitable conditions of a case. (Vance's Case, 30 Ct. of Cl. 252.) Several judgments may be entered in a case where three suits against three tribes of Indians have been united in one suit. (Barrow Porter & Co.'s Case, 30 Ct. of Cl. 54.) The court of claims does not lose jurisdiction with the expiration of the term unless a final judgment was rendered. (Book's Case, 31 Ct. of Cl. 272.)

§ 647. **Interested parties may testify.**—In the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the government. Section ten hundred and seventy-nine of the Revised Statutes is hereby repealed. The provisions of section ten hundred and eighty of the Revised Statutes shall apply to cases under this act. (24 U. S. Stats. 505, sec. 8.)

§ 648. **Appeals and writs of error—Procedure.**—The plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall confirm in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes. (24 U. S. Stats. 505, sec. 9.)

Appeals from court of claims.—In a departmental case transmitted under the Tucker Act of 1888, no appeal lies to the supreme court. The appeal allowed by the above section extends only to judgments. (Sanborn's Case, 27 Ct. of Cl. 485; In re Sanborn, 148 U. S. 222.) A decree after appeal and affirmance may be extended to a subsequently accruing cause of action. (Journeycake's Case, 30 Ct. of Cl. 172.) When a judgment may be reviewed in the supreme court, a decision must be confined to the legal and equitable rights of the parties. (Western Cherokee Indians' Case, 27 Ct. of Cl. 1.)

§ 649. **Appeal, when taken.**—When the findings of fact and the law applicable thereto have been filed in any case as provided in section 6 of this act, and the judgment or decree is adverse to the government, it shall be the duty of the district attorney to transmit to the attorney general of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the attorney general shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same; *provided*, that no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon at the rate of four per centum per annum until the time

when an appropriation is made for the payment of the judgment or decree. (24 U. S. Stats. 505, sec. 10.)

§ 650. **Report to Congress.**—The attorney general shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which a final judgment or decree has been rendered, giving the date of each, and a statement of the costs taxed in each case. (24 U. S. Stats. 505, sec. 11.)

§ 651. **Claims referred by departments.**—When any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court of claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted. (24 U. S. Stats. 505, sec. 12.)

Note.—When a claim is referred under this section the findings of the court of claims transmitted to the department is not a judgment within the meaning of sec. 9, Act 1887, or of Rev. Stats., sec. 707, and is therefore not appealable. (In re Sanborn, 148 U. S. 222.)

§ 652. **Claims referred under "Bowman act"—Judgment.**—In every case which shall come before

the court of claims, or is now pending therein under the provisions of an act entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," approved March third, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either house of Congress, or to the department by which the same was referred to said court. (24 U. S. Stats. 505, sec. 13.)

§ 653. **Reference of claims pending in Congress.**—Whenever any bill, except for a pension, shall be pending in either house of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the house in which such bill is pending may refer the same to the court of claims, who shall proceed with the same in accordance with the provisions of the act approved March third, eighteen hundred and eighty-three, entitled an "Act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," and report to such house the facts in the case and the amount, where the same can

be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy. (24 U. S. Stats. 505, sec. 14.)

Claims referred.—If a claim is referred to the court of claims by an act of Congress, it is subject to all the restrictions imposed by the resolution. (De Groot v. U. S., 5 Wall. 419; Ex parte Atocha, 17 Wall. 430; Roberts v. U. S., 92 U. S. 41; Tillson v. U. S., 11 Ct. of Cl. 758; Harvey v. U. S., 12 Ct. of Cl. 141; 13 Ct. of Cl. 322.) The determination of what are the facts relative to the rights of a claimant in a Congressional case, and the determination of what is competent evidence involve the exercise of the judicial function. To this extent Congress has made the court of claims a court of last resort. (Vance's Case, 30 Ct. of Cl. 252.)

§ 654. **Costs.**—If the government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court. (24 U. S. Stats. 505, sec. 15.)

§ 655. **Inconsistent laws repealed.**—All laws and parts of laws inconsistent with this act are

hereby repealed. (24 U. S. Stats. 505, sec. 16. Approved March 3, 1887.)

§ 656. **Claims allowed by the first auditor and commissioner of customs.**—Full and complete jurisdiction is conferred by the appropriation act of July 7, 1884, section 3, on the court of claims, on claims allowed by the first auditor and commissioner of customs, as to the expenses of collecting the revenue from customs prior to July 18, 1881, being the difference between amount paid and legal compensation fixed by Revised Statutes, sections 2733, 2738. (Act of July 7, 1884; 23 U. S. Stats. 257.)

§ 657. **Western Cherokee Indian claims.**—An act to authorize the court of claims to hear, determine, and render final judgment upon the claim of the old settlers or Western Cherokee Indians. (Feb. 25, 1889; 25 U. S. Stats. 694.)

§ 658. **Shawnee and Delaware Indian claims.**—An act to refer to the court of claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee nation, and for other purposes. (Oct. 1, 1890; 26 U. S. Stats. 636.)

§ 659. **Private claims in Congress.**—All petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon

any contract, expressed or implied, with the government of the United States, shall, unless otherwise ordered by resolution of the house in which they are introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, to the court of claims. (Rev. Stats. sec. 1060.)

Claims referred by Congress.—The jurisdiction of the court of claims over cases referred to it by either house of Congress is subject to provisions of general statutes of limitation regulating that jurisdiction. (Ford v. United States, 116 U. S. 213.) This court has jurisdiction of an action by a State against the United States for a demand arising upon an act of Congress. (United States v. Louisiana, 123 U. S. 32.)

§ 660. Judgments for setoff or counterclaim.—Upon the trial of any cause in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the government, against any person making claim against the government in said court, the court shall hear and determine such claim or demand both for and against the government and claimant; and if, upon the whole case, it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment filed in the clerk's office of any district or circuit court shall be entered upon the records thereof, and shall thereby become and be a judgment of such

court and be enforced as other judgments in such courts are enforced. (Rev. Stats. sec. 1061.)

Note.—This section is constitutional, although there is no provision for a jury trial. (McElrath v. U. S., 12 Ct. of Cl. 312.) If no definite evidence is given of the counterclaim, it may be used to defeat it, but judgments will not be entered against claimant. (Shrewsbury v. U. S., 13 Ct. of Cl. 183.) If the bankruptcy assignee of claimant becomes a party, the claim will be deducted from the counterclaim of the United States. (Boughton v. U. S., 13 Ct. of Cl. 284; see Allen v. U. S., 17 Wall. 207.)

§ 661. **Decree on accounts of paymasters, etc.** —Whenever the court of claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts. (Rev. Stats. sec. 1062.)

Accounts of disbursing officers, etc.—A disbursing officer is bound to exercise that degree of care and diligence which a prudent man would require of his agent (Malone v. U. S., 5 Ct. of Cl. 486); but what care and caution may require at one time may not be necessary at others. (Glenn v. U. S., 4 Ct. of Cl. 501; Malone v. U. S., 5 Ct. of Cl. 186.) If a disbursing officer puts money in a safe which is captured by the enemy, he is entitled to relief (Christian v. U. S., 7 Ct. of Cl. 431); or if his clerk, who has a key, steals it

and absconds (Howell v. U. S., 7 Ct. of Cl. 512); or a robber enters his quarters during his temporary absence, and breaks open the safe (U. S. v. Clark, 96 U. S. 37; S. C. 11 Ct. of Cl. 698); or if he leaves his safe or box in a fort, and it is stolen (Glenn v. U. S., 4 Ct. of Cl. 501); or if he keeps money in a chest in a building where other disbursing officers keep funds (Prune v. U. S., 3 Ct. of Cl. 209); or if he puts his desk with money and vouchers on a transportation train which is captured by the enemy (Murphy v. U. S., 3 Ct. of Cl. 212); or if, while carrying money in his breast pocket in the way such officers carry it, and he loses it, he is entitled to relief (Whittelsey v. U. S., 5 Ct. of Cl. 452); or if he puts money in the room where he sleeps, and it is taken by burglars, he is entitled to relief. (Malone v. U. S., 5 Ct. of Cl. 486.) The words "fault" or "negligence" must be taken in their common and popular sense, the former as error or mistake, and the latter as omission. (Malone v. U. S., 5 Ct. of Cl. 486.) So a paymaster is guilty of negligence if he intrusts a large amount of money to an orderly to take to bank instead of taking it himself. (Holman v. U. S., 11 Ct. of Cl. 642.)

§ 662. **Claims referred by departments.**—Whenever any claim is made against any executive department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the constitution of the United States, the head

of such department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto to be transmitted to the court of claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the secretary of the treasury may, upon the certificate of any auditor or comptroller of the treasury, direct any account, matter, claim of the character, amount, or class described in this section to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court for trial and adjudication; *provided*, that no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant. (Rev. Stats. sec. 1063.)

Reference of claims.—Claims involving disputed facts or controverted questions of law and where the amount in controversy exceeds $3,000, or in certain cases without regard to the amount involved may be transmitted to the court of claims, if not barred by time, and if such that the court of claims could take cognizance of at the suit of the claimant. (United States v. State of New York, 160 U. S. 598.) A claim may be referred by the head of a department at any time before payment (Delaware Steamboat v. U. S., 5 Ct. of Cl. 55), although previously referred to accounting officers (Winnisimmet Co. v. U. S., 12 Ct. of Cl. 319); so of a claim for army transportation (Delaware Steamboat v. U. S., 5 Ct. of Cl. 55); or a claim for rent of land. (Bright v. U. S., 6 Ct. of Cl.

118.) It may be referred, although it involves a controversy between several claimants. (Bright v. U. S., 6 Ct. of Cl. 118.) The head of a department, on referring the cause, transmits the necessary papers. (Delaware Steamboat v. U. S., 5 Ct. of Cl. 55.) The presentation of a claim for rent of rooms for postoffice purposes is sufficient to take the case referred under this section out of the operation of the statute of limitations. (Warder v. United States, 25 Ct. of Cl. 159.) A rule of the court of claims, which required that the claimant should have first gone through the department which might have entertained the claim before he could prosecute in that court, is void. (United States v. Clyde, 13 Wall. 35.) Where a claim allowed by the accounting officers and approved by the secretary was subsequently referred under the above section the court of claims has jurisdiction. (Glynn's Case, 32 Ct. of Cl. 82.) The jurisdiction of the court of claims in a case founded on an officer's account will not be exercised where the account stands suspended for explanation in the treasury, but will be exercised when the comptroller refuses to act. (Cameron's Case, 30 Ct. of Cl. 340.) Where a claim is referred under this section a demand for unliquidated damages is within the jurisdiction of the court. (Myerle's Case, 31 Ct. of Cl. 105.) The secretary of the treasury, after determining every fact concerning an informer's claim, may transmit a question of law for the decision of the court of claims. (Horton's Case, 31 Ct. of Cl. 148.) It is only by virtue of the pendency of a claim that an executive department has power to refer it to the court of claims for adjudication. (Armstrong's Case, 29 Ct. of Cl. 148; Colton's Case, 29 Ct. of Cl. 207.) Where a portion of an account is rejected and both the accounting officers and the claimant treat the ruling as final the claim for the balance cannot be transmitted. (Colton's Case, 22 Ct. of Cl. 207.) The cer-

tification of a war claim to the court of claims cannot give that court jurisdiction. (United States v. Winchester & P. R. Co., 163 U. S. 244.)

§ 663. **Procedure in cases transmitted by departments.**—All cases transmitted by the head of any department, or upon the certificate of any auditor or comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the court of claims, and shall, in all respects, be subject to the same rules and regulations. (Rev. Stats. sec. 1064.)

Cases transmitted.—Where the claimants contest and one fails to appear, a citation may issue (Bright v. U. S., 6 Ct. of Cl. 118); and the claimant must establish his claim by legal proof. (Bright v. U. S., 8 Ct. of Cl. 326.) Questions of law may be submitted for the decision of the court. (Amoskeag & C. Co. v. U. S., 6 Ct. of Cl. 99; Broulautour v. U. S., 7 Ct. of Cl. 555.) The allowance of the claim by accounting officers does not make out a prima facie case. (McKnight v. U. S., 98 U. S. 179.)

§ 664. **Judgments in cases transmitted by departments, how paid.**—The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the court of claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court. (Rev. Stats. sec. 1065.)

Note.—Allowance of a judgment against a collector of internal revenue, by the commissioner and the sec-

retary of the treasury, makes it a claim against the United States; and a judgment creditor may recover thereon in the court of claims. (United States v. Frerichs, 124 U. S. 315.) Its payment satisfies the demand. (Id.) The jurisdiction of the court of claims to find the facts, make conclusions of law, and to give opinions in matters referred to it by heads of the executive departments, without entering judgments, is not restricted by the following section forbidding jurisdiction of claims dependent on a treaty. (Thingvalla Line v. U. S., 24 Ct. of Cl. 255.)

§ 665. Judgments and claims subject to offsets. —That when any final judgment recovered against the United States or other claim duly allowed by legal authority shall be presented to the secretary of the treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant asserts to such set off, and discharges his judgment, or an amount thereof equal to said debt or claim, the secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff or claimant denies his indebtedness to the United States, or refuses to consent to the setoff, then the secretary shall withhold payment of such further amount of such judgment or claim as, in his opinion, will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such

debt is not already in suit, it shall be the duty of the secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such secretary, with six per cent interest thereon for the time it has been withheld from the plaintiff. (18 U. S. Stats. 481; 1 Sup. Rev. Stats. 185; Rev. Stats. sec. 1061 a.)

Note.—If the claimant consents that the debt be set off, accepts the balance, and discharges the judgment, he thereby waives his right to test its validity by legal proceedings. (Bounafin v. U. S., 14 Ct. of Cl. 484.)

§ 666. **Claims growing out of treaties.**—The jurisdiction of the said court shall not extend to any claim against the government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes. (Rev. Stats. sec. 1066.)

Note.—This court has no jurisdiction over claims of foreign governments, assumed by treaty. (Ex parte Atocha, 17 Wall. 439.) So of a treaty with the Indians. (Langford v. U. S., 12 Ct. of Cl. 338.) Under this section, the court of claims has no jurisdiction of a claim against the United States for money awarded

by the mixed commission under the Mexican convention of 1868. (Alling v. United States, 114 U. S. 562.) Nor has it jurisdiction of a claim for a part of the money received from Great Britain in payment of the Geneva award. (Great West Ins. Co. v. United States, 112 U. S. 193; Paulson v. U. S., 112 U. S. 193. But compare United States v. Weld, 127 U. S. 51, distinguishing the last two cases.) The French and American claims commission possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and a judgment thereon, by citizens of the other country. (Burthe v. Denis, 133 U. S. 514.) The court of claims does not enter judgment in French spoliation cases, or determine what persons are entitled to the money which Congress may thereafter appropriate. (The Ganges, 25 Ct. of Cl. 110.) The obligation is founded on the law of nations, and the obligation on the offending government is perfect. (Emerson v. Hall, 13 Pet. 409.) The award of the French-American Commission is conclusive upon the validity of the claim, but not upon conflicting rights. (De Circe's Succession, 41 La. Ann. 506.) When paid to the executor it will be distributed in the course of administration. (Id.) Where the contention of plaintiffs in error, that they are entitled to an award rendered by the French and American claims commission, is founded upon the French treaty of 1880, the decision of the supreme court of Louisiana against the rights thus asserted by them presents a question for the jurisdiction of the supreme court of the United States. (Burthe v. Denis, 133 U. S. 514.) Under the convention held in pursuance of the treaty between the United States and Mexico, awards by commissioners are final and conclusive as between the United States and Mexico, until set aside by agreement between the two governments, or otherwise. (Frelinghuysen v. Key, 110 U. S. 63.)

§ 667. **Claims pending in other courts.**—No person shall file or prosecute in the court of claims, or in the supreme court on appeal therefrom, any claims for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. (Rev. Stats. sec. 1067.)

§ 668. **Aliens.**—Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the court of claims, whereof such court, by reason of their subject matter and character, might take jurisdiction. (Rev. Stats. sec. 1068.)

Aliens—When may prosecute claims.—Aliens of governments contemplated in this section may prosecute claims against the United States, although such governments may reserve the right to deny the remedy on a few sporadic cases. (U. S. v. O'Keefe, 11 Wall. 178; Carlisle v. U. S., 16 Wall. 147.) If an alien was naturalized before the adoption of this section he may prosecute his action (Bulwinkle v. U. S. 4 Ct. of Cl. 395; Mentz v. U. S., 4 Ct. of Cl. 471), and if naturalized before the plea of alienage, he may prosecute an action commenced before its adoption. (Scharfer v. U. S., 4 Ct. of Cl. 529; Warner v. U. S., 5 Ct. of Cl. 637.) The right is granted fully under this

section, although a citizen of the United States is required to give security for costs. (Brown v. U. S., 5 Ct. of Cl. 571.) The following governments accord to citizens of the United States the right to prosecute claims in their courts, to wit: Belgium: De Give v. U. S., 7 Ct. of Cl. 577; France: Rothchild v. U. S., 6 Ct. of Cl. 204; Dauphin v. U. S., 6 Ct. of Cl. 221; Great Britain: U. S. v. O' Keefe, 11 Wall. 178; Carlisle v. U. S., 16 Wall. 147; Italy: Fichera v. U. S., 9 Ct. of Cl. 254; Prussia: Brown v. U. S., 5 Ct. of Cl. 571; Spain: Nohing v. U. S., 6 Ct. of Cl. 269; Switzerland: Lobsiger v. U. S., 5 Ct. of Cl. 687. The jurisdiction of a commission appointed under a treaty to pass upon a war claim of an alien is limited to the determination of the validity of the claim. (Bodemuller v. United States, 39 Fed. Rep. 437.) After it has been passed upon by a commission, a cause of action for a recovery of the amount awarded is not against the government of which the alien was a citizen, where it is not shown that the money was paid to that government for his benefit. (Bodemuller v. United States, Id.) Where a deduction is made on the ground that one of the heirs is a citizen of Louisiana, where there is no proof of his right to sue therefor, suit must be brought by the administratrix, and not by the heir. (Id.)

§ 669. **Limitation.**—Every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the Senate or the clerk of the House of Representatives, as provided by law, within six years after the claim first accrues; *provided*, that the claims of married women first accrued during marriage, of persons un-

der the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. (Rev. Stats. sec. 1069.)

Limitations.—This section provides that every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court within six years after the claim first accrues. (U. S. v. Taylor, 104 U. S. 221.) The claim is barred unless the petition is filed within six years after it accrued (Bell v. U. S., 20 Wall. 179; McKnight v. U. S., 98 U. S. 179; Cross v. U. S., 4 Ct. of Cl. 271; Carter v. U. S., 6 Ct. of Cl. 31; Bulkeley v. U. S., 8 Ct. of Cl. 517; Campbell v. U. S., 13 Ct. of Cl. 108); but the petition may be amended although more than six years have elapsed. (Griffin v. U. S., 13 Ct. of Cl. 257; Devlin v. U. S., 12 Ct. of Cl. 266.) So it is not necessary that the limitation be pleaded, as the court is bound to take cognizance of the statute, and inquire whether it appears on the face of the pleadings and evidence that the period had not expired when the petition was filed. (Kendall v. U. S., 14 Ct. of Cl. 122.) The court of claims has authority to hear and determine the claim of any disbursing officer for relief from responsibility on account of capture or other loss of funds while in the line of his duty. (U. S. v. Clark, 96 U. S. 37.) The limitation applies to the postmaster for relief for money stolen from him when

government has refused to allow his claim. (U. S. v. Smith, 105 U. S. 620.) The limitation does not apply to suits pending at the time of its adoption (Parlin v. U. S., 1 Ct. of Cl. 174); nor to a claim which had been referred by the head of an executive department for its judicial determination, provided it was presented within six years after it accrued (U. S. v. Lippitt, 100 U. S. 663; Winnisimmet Co. v. U. S., 12 Ct. of Cl. 319); nor does it apply to claims for proceeds of captured and abandoned property. (Tibbitts v. U. S., 1 Ct. of Cl. 169; S. C., 2 Ct. of Cl. 582.) No exception not found in the statute can be ingrafted. (Cross v. U. S., 4 Ct. of Cl. 271.) If claimant dies before the claim is due the statute will not begin to run until an administrator is appointed (Falenweider v. U. S., 9 Ct. of Cl. 403); but its operation is not suspended by his death if it accrued in his lifetime (Sierra v. U. S., 9 Ct. of Cl. 224); nor will the payment of part of the debt take the claim out of the statute. (U. S. v. Wilder, 13 Wall. 254.) If claimant was an inhabitant of an insurrectionary State, and the claim accrued during the civil war, the statute runs from the time of the suppression of the rebellion (Sierra v. U. S., 9 Ct. of Cl. 224), and not from the date of the proclamation of pardon and amnesty. (Kendall v. U. S., 14 Ct. of Cl. 374.) A collector of customs' claim for his salary accrues at the end of each fiscal year, and the statute runs from that time (Bachelor v. U. S., 8 Ct. of Cl. 235; Ellsworth v. U. S., 14 Ct. of Cl. 582); and for money paid into the treasury which he is entitled to retain the statute runs from its payment. (Lawson v. U. S., 14 Ct. of Cl. 332.) So a cause of action accrues upon the refusal of the secretary of the treasury to pay money, the surplus proceeds of land sold for a district tax. (Taylor v. U. S., 14 Ct. of Cl. 339.) A claim for money arises when it is paid into the treasury (Clark v. U. S., 99 U. S. 493); but for

money lost by claimant the statute does not begin to run until the accounting officers of the treasury refuse to recognize the claim as a valid credit. (U. S. v. Clark, 96 U. S. 37; Smith v. U. S., 14 Ct. of Cl. 114.) On a contract for sale of goods the statute runs from the time the price is payable. (Batelle v. U. S., 7 Ct. of Cl. 297.) Where the court has jurisdiction of matter offered in evidence the statute is no bar to a defense involving such matters. (U. S. v. Clark, 96 U. S. 43.) The statute of limitations begins to run against a claim for the surplus proceeds of lands sold for taxes, under the act of 1861, from the date of the demand therefor upon the secretary of the treasury. (U. S. v. Lawton, 110 U. S. 146; approving U. S. v. Taylor, 104 U. S. 216.) The general rule that limitation does not operate by its own force as a bar, but is a defense which must be set up to be availed of, does not apply to suits in the court of claims against the United States. (Finn v. United States, 123 U. S. 227.) The limitation of six years in this section applies to a claim of the State for moneys due to it from the five per cent fund. (U. S. v. Louisiana, 127 U. S. 182.) It applies to a claim for relief by a paymaster in the army for money stolen from him, and which he has replaced and paid over. (U. S. v. Smith, 105 U. S. 620; distinguishing U. S. v. Clark, 96 U. S. 43.) An action by the State to recover moneys received by the United States from sale of swamp-lands is not barred until six years after the amount is ascertained by the commissioner of the general land office. (United States v. Louisiana, 123 U. S. 32.) A claim on behalf of a United States marshal for the allowance by the government, of expenses incurred by him in the service for it of a distress warrant, which accrued more than forty-seven years before it was presented to the treasury department, is a stale claim, which the accounting officers have no right to receive, examine, or settle. (Waddell v. U. S., 25 Ct. of Cl. 323.)

§ 670. **Rules of practice—Contempts.**—The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law. (Rev. Stats. sec. 1070.)

Note.—A motion for an order upon the court of claims to make and return additional findings will be denied, unless it has first been submitted to such court in a written request, as required by the rule. (United States v. Driscoll, 96 U. S. 421.)

§ 671. **Oaths and acknowledgments.**—The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same. (Rev. Stats. sec. 1071.)

§ 672. **Petition.**—The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in Congress, or by any of the departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the

original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent, or attorney. (Rev. Stats. sec. 1072.)

Petition, what to contain.—The petition must set forth claimant's case with precision, and without ambiguity, and its allegations will be construed most strongly against the claimant. (Merch. Exch. Co. v. U. S., 1 Ct. of Cl. 332; Guttman v. U. S., 6 Ct. of Cl. 111.) It must set forth the facts upon which the right to recover rests (Merch. Exch. Co. v. U. S., 1 Ct. of Cl. 332; Brown v. U. S., 1 Ct. of Cl. 377; Baird v. U. S., 5 Ct. of Cl. 348; 8 Ct. of Cl. 13; Guttman v. U. S., 6 Ct. of Cl. 111; Monk v. U. S., 12 Ct. of Cl. 293; Morgan v. U. S., 14 Ct. of Cl. 442); and an alien must aver that he never in any way aided, abetted, or encouraged the rebellion (Hill v. U. S., 8 Ct. of Cl. 470); or if he did, that he had been pardoned. (Pargoud v. U. S., 13 Wall. 156; contra, Brockett v. U. S., 2 Ct. of Cl. 213.) It must state the amount of the claim or relief demanded (Patterson v. U. S., 6 Ct. of Cl. 60); for money illegally exacted as duties it must aver that a protest was made as required by law (Schlessinger v. U. S., 1 Ct. of Cl. 16; Nicoll v. U. S., 1 Ct. of Cl. 70); and if founded on an act of Congress, it must refer to the act. (Noble v. U. S., Dev. Ct. Cl. 134.) It must set forth some legal disabilities to remove the bar of the statute where it shows the claim accrued more than six years before its filing (Kendall v.

U. S., 14 Ct. of Cl. 122; Kendall v. U. S., 14 Ct. of Cl. 374); but the disability of one who indorsed a draft, and passed it away before the rebellion, will not avail the holder. (Pierce v. U. S., 1 Ct. of Cl. 195.) It need not set forth the evidence to be used to prove the facts set forth. (Noble v. U. S., Dev. Ct. Cl. 134.) If defective in its averments it may be amended (Jones v. U. S., 1 Ct. of Cl. 183); but not without leave of court (Shaw v. U. S., 9 Ct. of Cl. 301); as by substituting the assignor (Cote v. U. S., 3 Ct. of Cl. 64); or so as to make a ward party on his coming of age. (Stanton v. U. S., 4 Ct. of Cl. 456.) So on a petition to recover rent due on installments, a party may amend so as to include the entire rent. (Cross v. U. S., 14 Wall. 479.) If a claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief, either in a general manner or in an alternative or cumulative form, the court should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to. (United States v. Behan, 110 U. S. 338; Clark v. United States, 95 U. S. 539.) The court of claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading. (United States v. Burns, 12 Wall. 246.) If the petition shows that plaintiff's claim is founded on acts of officers of the government, which are authorized by Congress, it is immaterial whether the petition claims compensation as upon an implied contract or for damages. (Chappell v. United States, 34 Fed. Rep. 673.)

Who may petition.—If a chose in action has been assigned the assignor may sue for the benefit of the assignee (Jackson v. U. S., 1 Ct. of Cl. 260; Crowell v. Jackson, 6 Ct. of Cl. 23); but the assignee must be connected with the case (Silverhill v. U. S., 5 Ct. of Cl. 610); and the connection of the assignor may be

shown by his verification, or by warrant of attorney, or by proof of the transfer. (Silverhill v. U. S., 5 Ct. of Cl. 610.) A corporation created in an insurrectionary State may petition (U. S. v. Insurance Co., 22 Wall. 99); and if joint owners join they may amend so as to serve in the prayer for relief, and ask for separate judgment on the merits. (Mott v. U. S., 3 Ct. of Cl. 218.) A feme covert under the laws of the State may file a petition in her own name. (Stanton v. U. S., 4 Ct. of Cl. 456; Meriwether v. U. S., 13 Ct. of Cl. 259.) A petition may be filed in the State by a guardian, where the ward has his domicile. (Stanton v. U. S., 4 Ct. of Cl. 456.) A suit may be brought in the name of the party in whom the legal title is, to the use of the party to whom the real and substantial ownership has passed. (American Tobacco Co.'s Case, 32 Ct. of Cl. 207.) A party possessing full title to a vessel in law is the proper party to maintain a suit though creditors may be beneficiaries and have a claim upon the recovery. (Ship Ganges, 31 Ct. of Cl. 175.) The assignee of a chose in action not a commercial instrument cannot maintain an action in his own name. (U. S. v. Gillis, 95 U. S. 407; Atocha v. U. S., 17 Wall. 439; Jackson v. U. S., 1 Ct. of Cl. 260; Sines v. U. S., 1 Ct. of Cl. 12; Cote v. U. S., 3 Ct. of Cl. 64; Johnston v. U. S., 13 Ct. of Cl. 217.) If the assignment merely transfers a part interest the suit cannot be brought to the use of assignee. (Rains v. U. S., 11 Ct. of Cl. 648.) The provisions of this section have no application to a sale prior to seizure of captured and abandoned property. (Bates v. U. S., 4 Ct. of Cl. 569.) On an assignment for benefit of creditors the trustees may prosecute in the name of the assignor. (Morgan v. U. S., 14 Ct. of Cl. 319.) If a claimant becomes bankrupt the assignee may prosecute the suit. (Persons v. U. S., 8 Ct. of Cl. 542.) And a purchaser from the assignee is entitled to be sub-

stituted. (Burke v. U. S., 13 Ct. of Cl. 231.) A party who asserts a claim must prove the transfer, and the nature and extent of his right. (Tebbets v. U. S., 5 Ct. of Cl. 607; Crowell v. U. S., 6 Ct. of Cl. 23.) A decree in a State court, appointing a receiver, and authorizing him to sue in the court of claims, has no force in the latter court, and a suit by him will be dismissed. (Howes v. U. S., 24 Ct. of Cl. 170.) One who is not a party to a contract, either originally or by substitution, cannot maintain a claim before the court of claims for compensation under it. (Kellogg v. U. S., 7 Wall. 361.) Sovereignties, corporations, and individuals or aggregations of individuals may be parties litigant. (Western Cherokee Indian's Case, 27 Ct. of Cl. 1.) Where the administrator of the original sufferer obtains the consent of the assignee in bankruptcy, he may be substituted as claimant. (Ship Concord, 27 Ct. of Cl. 142.) The surety of a defaulting contractor who completes the work in the name of his principal may bring a suit in his own name for a balance earned by his principal. (Hitchcock's Case, 27 Ct. of Cl. 185.) In Congressional cases where there is no vested legal right a parent may prosecute on behalf of his child; and the infant on coming of age may be substituted to prosecute in his own name. (Kirtley's Case, 27 Ct. of Cl. 348.) The defendants by pleading a general traverse admit the competency of a claimant corporation to sue in its corporate capacity. (Southern Pacific Co.'s Case, 28 Ct. of Cl. 77.)

Interest of parties.—If a claimant proceeds alone when jointly interested he must show the extent of his interest (Headman v. U. S., 5 Ct. of Cl. 640); and although there are two contracts yet one may file the petition alone if the other is disqualified. (U. S. v. Burns, 12 Wall. 246; Fain v. U. S., 4 Ct. of Cl. 237; Mildrim v. U. S., 7 Ct. of Cl. 595.) Several parties may join in a petition although they brought it in

severalty. (Rutherford v. U. S., 1 Ct. of Cl. 481.) All who have an interest should join (Hale v. U. S., Dev. Ct. of Cl. 137); but if they have separate interests they cannot join (Wilson v. U. S., 1 Ct. of Cl. 318; Parish v. U. S., 1 Ct. of Cl. 345), and a change of parties may be allowed to sustain and protect the original cause of action. (Bellocque v. U. S., 8 Ct. of Cl. 493.) Where the party who brings the suit possesses some legal relation with the proper party the court has power to substitute the latter after the jurisdictional period. (Davenport's Case, 31 Ct. of Cl. 430; Kelly's Case, 32 Ct. of Cl. 227.) But where a person neglects to bring his action and suit is brought in mistake of fact by one purporting to be his administrator, he cannot take advantage of the unauthorized suit. (Tryon's Case, 32 Ct. of Cl. 425.) If two persons join when only one is entitled to the claim, the petition may be amended by striking out the name of the other party. (Molina v. U. S., 6 Ct. of Cl. 269.) If claimants are partners the disloyalty of one partner defeats the action. (Schreiner v. U. S., 6 Ct. of Cl. 359.) A partner cannot intervene and claim the same property as that claimed by the firm. (Bellocque v. U. S., 8 Ct. of Cl. 493.) Although one person is a member of two separate firms yet the firms cannot unite in one petition. (Parish v. U. S., 1 Ct. of Cl. 345.) If a feme covert and her husband file a joint petition, and he dies, she may prosecute alone in her own name (Roddin v. U. S., 6 Ct. of Cl. 308); and where the husband is sole owner of the claim the name of the wife may be stricken out. (Benton v. U. S., 5 Ct. of Cl. 692.) If a person claims money not already claimed he may intervene in the pending suit. (Mezeix v. U. S., 6 Ct. of Cl. 232; Turner v. U. S., 2 Ct. of Cl. 390.) On a petition by a firm claiming certain property a partner cannot intervene and claim the same property. (Bellocque v. U. S., 8 Ct. of Cl. 493.) If a person files a

petition to recover bonds alleged to be illegally held by others, the service of citation will not bring the parties within the jurisdiction unless they come in voluntarily and prosecute a cross-action. (Texas v. U. S., 7 Ct. of Cl. 301.) A contractor is bound by the settlement made with a party whom he permits to file a petition in his name. (Stowe v. U. S., 19 Wall. 13.)

Claim by agent.—Although an agent makes a contract in his own name without disclosing his principal, yet the principal may petition in his own name (Ramsdell v. U. S., 2 Ct. of Cl. 508) or the petition may be filed in the name of the agent for the use of the principal (Ramsdell v. U. S., 2 Ct. of Cl. 508); and it may be amended to show that the action is prosecuted for the use of another (Shaw v. U. S., 9 Ct. of Cl. 301); and when an action is brought in the name of one person for the use of another, the money is paid to the real party in interest. (Crowell v. U. S., 6 Ct. of Cl. 23.)

Attorneys in court of claims.—A partner of a firm cannot have his attorney associated with the attorney of the firm. (Bellocque v. U. S., 8 Ct. of Cl. 493.) An assignee in bankruptcy succeeding a claimant may discharge an attorney upon paying his disbursements. (Johnson v. U. S., 11 Ct. of Cl. 724.) If petitioner desires to change his attorney he must repay all disbursements and give his attorney a lien for his fees (Desmare v. U. S., 9 Ct. of Cl. 1; Carver v. U. S., 7 Ct. of Cl. 499); and an executor or administrator can only change the attorney on the usual terms. (Johnson v. U. S., 11 Ct. of Cl. 724.) A client may change his attorney and employ other counsel. (Carver v. U. S., 7 Ct. of Cl. 499.) A court of claims may authorize a compensation to counsel of an Indian tribe out of the amount recovered by it of the government. (United States v. Blackfeather, 155 U. S. 180.) Coun-

sel are members of the bar retained by the attorney of record to assist in the preparation of a case or argue it before the court. Their services and responsibilities are individual; a law firm cannot be recognized as counsel. The attorney of record is the only agency recognized by the court in the control of the case. (Matter of Counsel, 32 Ct. of Cl. 231.) A retired officer cannot act as attorney in suits against the government. (In re Winthrop, 31 Ct. of Cl. 35.) Counsel can neither make motions in their own name nor in the name of the attorney of record without his authority. (Matter of Counsel, 32 Ct. of Cl. 231.)

Commingling of rights.—If the goods of several owners are commingled the claims of the several claimants may be consolidated. (U. S. v. Raymond, 92 U. S. 651; Woodruff v. U. S., 4 Ct. of Cl. 486.) So if assignees of vouchers under one contract bring separate suits they may be consolidated. (Crowell v. U. S., 6 Ct. of Cl. 23.) If the suits of several claimants are united the first claimant will have to make out his claim against the United States only, and the junior claimant will have to make his title good against first claimant. (Woodruff v. U. S., 4 Ct. of Cl. 486.) If suits for the same fund are united no testimony can be used unless the party has had an opportunity to cross-examine the witness. (Woodruff v. U. S., 4 Ct. of Cl. 486; Boyd v. U. S., 9 Ct. of Cl. 419.)

Pleading.—The pleadings need not present a single issue; the substance rather than the technicalities will be regarded. (Peirce v. U. S., 1 Ct. of Cl. 195; Benton v. U. S., 5 Ct. of Cl. 602; Baird v. U. S., 8 Ct. of Cl. 13.) Where the objection goes to the jurisdiction it should be taken by plea (Peirce v. U. S., 1 Ct. of Cl. 195; Penn. Co. v. U. S., 7 Ct. of Cl. 401), and such plea may be filed after the general issue. (Peirce v. U. S., 1 Ct. of Cl. 195); but where the objection goes

to the right of the claimant to recover, it should be taken by demurrer or plea (Penn. Co. v. U. S., 7 Ct. of Cl. 401); and a special demurrer cannot allege a fact not stated in the petition. (Graham v. U. S., 1 Ct. of Cl. 183.) If a traverse has been filed a plea to the jurisdiction should not be filed without leave of court. (Peirce v. U. S., 1 Ct. of Cl. 195.) If the United States does not traverse an allegation of loyalty it will be presumed true (Hill v. U. S., 8 Ct. of Cl. 470); and if it files a general traverse that it is not verified it waives the want of verification. (Griffin v. U. S., 13 Ct. of Cl. 257.) A traverse requires claimant to establish all material allegations by proof. (Calkins v. U. S., 1 Ct. of Cl. 382.)

Verification of petition.—If the petition is not verified, a motion may be made to dismiss it (Griffin v. U. S., 13 Ct. of Cl. 257); or an amended petition properly verified may be filed. (Griffin v. U. S., 13 Ct. of Cl. 257.) If the assignor dies pendente lite the verification of his executor to an amended petition sufficiently connects him with the case. (Pullen v. U. S., 7 Ct. of Cl. 507.) If a petition presented by a firm avers a joint title, and is verified by one partner, judgment will be rendered in favor of the firm. (Richmond v. U. S., 7 Ct. of Cl. 533.)

Evidence.—If there is an omission to furnish certain proof the case may be remanded for further proof even after final hearing (Kirby v. U. S., 3 Ct. of Cl. 265; Daniels v. U. S., 5 Ct. of Cl. 65; Mahan v. U. S., 5 Ct. of Cl. 331; Fendall v. U. S., 12 Ct. of Cl. 305); but it would not be remanded where there is a conflict of testimony. (Crowell v. U. S., 6 Ct. of Cl. 23; Shrewsbury v. U. S., 13 Ct. of Cl. 183.) Where a case is remanded for further proof either party may take further testimony on every fact (Culliton v. U. S., 5 Ct. of Cl. 627); and a witness may be re-exam-

ined. (Gaither v. U. S., 3 Ct. of Cl. 191.) If there are documents that are not competent evidence the case may be remanded to give opportunity to stipulate concerning them. (Lender v. U. S., 5 Ct. of Cl. 544.)

Dismissal of suit.—The claimant cannot dismiss his own suit until he has discharged his attorney with permission of the Court; and when he has wrongfully brought several actions for the same cause he can elect which one he will prosecute. (Redfield's Case, 27 Ct. of Cl. 473.)

§ 673. **Petition, when dismissed.**—The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the government may be traversed by the government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed. (Rev. Stats. sec. 1073.)

Note.—Where a person struggling to maintain his legal right to his slaves voluntarily continued his domicile within the territory of the power devoted to the maintenance of slavery, it may be inferred that he desired its success and was not loyal in fact. (Austin v. United States, 25 Ct. of Cl. 437.)

§ 674. **Burden of proof and evidence as to loyalty.**—Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the

United States, and did give no aid or comfort to persons engaged in such rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be *prima facie* evidence that such person did give aid and comfort to said rebellion, and to the persons engaged therein. (Rev. Stats. sec. 1074.)

Note.—An express proviso in a private act, that it be shown "to the satisfaction of the court" that neither the owner nor any of his surviving representatives gave any aid or comfort to the late rebellion, but "were throughout the war loyal to the government," means that they must have been loyal in fact, and not merely have legal loyalty derived from the proclamation of general amnesty. (Austin v. United States, 25 Ct. of Cl. 437.)

Aid and comfort.—To constitute "aid and comfort" to persons engaged in the rebellion the acts must have been committed with the intention of aiding the rebellion (Grossmeyer v. U. S., 4 Ct. of Cl. 1); and that the aid and comfort was given must be shown (Hill v. U. S., 3 Ct. of Cl. 470), and any acts which tend to assist, countenance, or encourage constitute the aid and comfort. (Bond v. U. S., 2 Ct. of Cl. 528; Bates v. U. S., 4 Ct. of Cl. 569.) So, engaging in the rebellion was aid to it (Grossmeyer v. U. S., 6 Ct. of Cl. 1); or serving on the reserved force if he could have avoided it (Kuper v. U. S., 3 Ct. of Cl. 74); or being voluntarily connected with a violation of the blockade (Bates v. U. S., 4 Ct. of Cl. 560); but not unless the adventure was put afloat. (Hill v. U. S., 8 Ct. of Cl. 470.) So becoming surety on an official bond of a military officer of the rebellion is aid to the rebellion (U. S. v. Padelford, 9 Wall. 531), or selling goods to

an agent of the rebel government (Carlisle v. U. S., 16 Wall. 147); but offers and acts of affection and humanity by persons to individuals engaged in the rebellion do not come within the interdiction of the statute. (Grossmeyer v. U. S., 4 Ct. of Cl. 1.) A claimant is entitled to prosecute if the aid and comfort were not voluntarily given (U. S. v. Padelford, 9 Wall. 531); so taxes paid under compulsion do not constitute aid and comfort to the rebellion. (Grossmeyer v. U. S., 4 Ct. of Cl. 1.) If claimant is a mere trustee he must make proof of the loyalty of the beneficiaries of the trust (Stoddart v. U. S., 6 Ct. of Cl. 230); but if an administrator was owner of the property at the time of capture or abandonment, his right to recover the proceeds depends on his own loyalty. (Carrol v. U. S., 13 Wall. 151.)

Proof of loyalty.—This section does not essentially change the nature of proof required by prior statutes. (U. S. v. Padelford, 9 Wall. 531; Grossmeyer v. U. S., 4 Ct. of Cl. 1.) If claimant has not obtained a pardon he must prove his loyalty. (U. S. v. Burns, 12 Wall. 246; Patterson v. U. S., 6 Ct. of Cl. 40; Deeson v. U. S., 6 Ct. of Cl. 227; S. C., 5 Ct. of Cl. 626.) And very slight evidence is sufficient to establish the loyalty of a colored citizen of the rebel States. (Thomas v. U. S., 3 Ct. of Cl. 52; Dereef v. U. S., 3 Ct. of Cl. 163.) Evidence of any act which tended to support the rebellion where no other motive is apparent is evidence of bad intention. (Grossmeyer v. U. S., 4 Ct. of Cl. 1.) An alien need not prove that he did not adhere to the United States; it is sufficient that he observed a neutral course (Rothschild v. U. S., 6 Ct. of Cl. 204), and his residence in a foreign county raises the presumption that he preserved his neutrality. (Hill v. U. S., 8 Ct. of Cl. 470.) The presumption of loyalty is in favor of one who was citizen and resi-

dent of a loyal State. (Turner v. U. S., 3 Ct. of Cl. 400.) In all congressional cases loyalty or disloyalty is a fact which may be shown by either party. In cases for stores and supplies loyalty is jurisdictional. When jurisdictional, the court cannot look beyond the petition to ascertain whose loyalty must be established. If the loyalty of the right party is not established on the preliminary inquiry, the case will fail when heard on the merits. (Kirtley's Case, 27 Ct. of Cl. 348.)

Effect of pardon.—The proclamation of pardon and amnesty relieves the claimant who is within its terms from the necessity to prove that he gave no aid to the rebellion. (Armstrong v. U. S., 13 Wall. 154; Pargoud v. U. S., 13 Wall. 156; Carlisle v. U. S., 16 Wall. 147; Haym v. U. S., 7 Ct. of Cl. 443; Waring v. U. S., 7 Ct. of Cl. 504; but see Mills v. U. S., 6 Ct. of Cl. 253.) So taking the oath of amnesty blots out the offense. (U. S. v. Padelford, 9 Wall. 531; U. S. v. Klein, 13 Wall. 128; Hamilton v. U. S., 7 Ct. of Cl. 444; Backer v. U. S., 7 Ct. of Cl. 551; Hardie v. U. S., 8 Ct. of Cl. 316; but see Brocket v. U. S., 2 Ct. of Cl. 213.) If the owner died before issuance of the proclamation, the administrator cannot recover unless he proves decedent did not give aid and comfort to the rebellion. (Meldran v. U. S., 7 Ct. of Cl. 595; Scott v. U. S., 8 Ct. of Cl. 457; Sierra v. U. S., 9 Ct. of Cl. 224.) If the pardon is conditioned upon taking an oath, he is not entitled to its benefit until the oath is taken (Waring v. U. S., 7 Ct. of Cl. 501), and taking it before the granting of the pardon is not sufficient. (Haym v. U. S., 7 Ct. of Cl. 443.) An alien domiciled within the United States is within the terms of the proclamation. (Carlisle v. U. S., 16 Wall. 147; Green v. U. S., 8 Ct. of Cl. 412.) The pardon granted by the president prior to Revised Statutes, section 3480, did not authorize payment of a claim to such person

which originated prior to April 13, 1861. The court has no jurisdiction further than to find the facts. (Hart v. United States, 118 U. S. 62.) A condition in a pardon forbidding a claim to any property, or the proceeds of any property, sold under the confiscation laws, does not preclude application to the court for the proceeds of a money bond secured by a confiscated mortgage. (Osborn v. United States, 91 U. S. 474.)

§ 675. Commissioners to take testimony.—The court of claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it; to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States. (Rev. Stats. sec. 1075.)

Testimony admissible.—Testimony to be used in the court of claims must be taken by deposition (Hughes v. U. S., 4 Ct. of Cl. 64); and ex parte affidavits cannot be used (Wiggins v. U. S., 2 Ct. of Cl. 345); although transmitted with the petition to Congress. (Clark v. U. S., 1 Ct. of Cl. 246; McKee v. U. S., 1 Ct. of Cl. 336; Wilde v. U. S., 7 Ct. of Cl. 415.) In the court of claims the common-law rules govern unless a different rule be prescribed by statute. (Allen's Case, 28 Ct. of Cl. 141.)

Commission.—The application for the issue of a commission may be made at any time before the trial (Atocha v. U. S., 6 Ct. of Cl. 95), and when made an order is entered by the clerk as of course (Gibbons v. U. S., Dev. Ct. Cl. 138; Mahan v. U. S., 6 Ct. of Cl. 331), and whether its issuance will lead to a post-

ponement is to be determined by the facts of the case. (Atocha v. U. S., 6 Ct. of Cl. 95.) The court of claims may refer to a special commissioner to state the accounts, marshal the assets, and adjust the losses between the different owners of intermingled cotton; and the judgment on such report and other evidence is valid. (Intermingled Cotton Cases, 92 U. S. 651.) When a witness lives in the District of Columbia, his testimony may be taken in court or before a commissioner; when at a distance it must be taken by commission. (Etling's Case, 27 Ct. of Cl. 158.)

Depositions.—The deposition must state what the witness testifies to in the presence of all the parties, and additions made in the absence of an attorney of one of the parties will be stricken out. (Shrewsbury v. U. S., 9 Ct. of Cl. 333.) It should be read over to and be signed by the witness. (Martin v. U. S., 3 Ct. of Cl. 384.) If the commissioner writes it out from his phonographic notes, and then attaches a loose sheet bearing the signature of the witness, it will be suppressed. (Martin v. U. S., 3 Ct. of Cl. 384.) The sheets of a deposition should be so connected as that they cannot be tampered with, and each sheet should be signed by the commissioner and the witness. (Martin v. U. S., 3 Ct. of Cl. 384.)

Examination of witness.—Objections which go merely to the form of a question should be taken at the examination (Hughes v. U. S., 4 Ct. of Cl. 64); so of objections to parol evidence of the contents of a written instrument (Hughes v. U. S., 4 Ct. of Cl. 64); but if the deposition is taken upon written interrogatories, and the witness states the contents of a written paper, the objection may be made after the return of the deposition (Hughes v. U. S., 4 Ct. of Cl. 64); and objections which go merely to the manner of taking the testimony must be made before the hear-

ing (Hughes v. U. S., 4 Ct. of Cl. 64); but if they go to the competency or relevancy of the testimony, they may be taken at the hearing. (Hughes v. U. S., 4 Ct. of Cl. 64.) The right to examine a witness is lost after one examination, and if a party requires a re-examination he must obtain leave of the court (Atocha v. U. S., 6 Ct. of Cl. 95; Mahan v. U. S., 6 Ct. of Cl. 331); and if he neglects to apply for leave, the admission of a second examination is within the discretion of the court (Mahan v. U. S., 6 Ct. of Cl. 331); and when leave is granted he cannot be examined on other than the particular point specified. (Sevier v. U. S., 7 Ct. of Cl. 388.)

§ 676. **Power to call upon departments for information.**—The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees of each house of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest. (Rev. Stats. sec. 1076.)

§ 677. **When testimony not to be taken.**—When it appears to the court in any case that the facts set forth in the petition of the claimant do no furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony therein. (Rev. Stats. sec. 1077.)

§ 678. **Witnesses not excluded.**—No witness

shall be excluded in any suit in the court of claims on account of color. (Rev. Stats. sec. 1078.)

Note.—Rev. Stats., sec. 1079, was repealed March 3, 1887, sec. 8; 24 U. S. Stats. 506. This section was held to restore the common-law rule as it existed before the adoption of section 858. (U. S. v. Clark, 96 U. S. 37.) But it does not prevent the United States from using as a witness to defeat a claim one whose interest is adverse to the claimant. (Bradley v. U. S., 104 U. S. 442.)

Exclusion of witnesses.—The exclusion in this section reaches three classes of persons: the claimant, the person who has transferred the claim to the claimant, and any one interested in the event of the suit (U. S. v. Anderson, 9 Wall. 56), unless he testifies against the claim. (Wood v. U. S., 10 Ct. of Cl. 395.) So a claimant cannot testify in his own favor (McKee v. U. S., 1 Ct. of Cl. 336; Jones v. U. S., 1 Ct. of Cl. 383; Stoddard v. U. S., 4 Ct. of Cl. 511; Brooke v. U. S., 2 Ct. of Cl. 180); and his deposition taken before the adoption of this section cannot be used in the suit (Hubbell v. U. S., 4 Ct. of Cl. 37; Waters v. U. S., 4 Ct. of Cl. 389); but if a corporation is claimant, the trustees are competent witnesses (Hebrew Congregation v. U. S., 6 Ct. of Cl. 241); and if the title or right of claimant to relief is established by other evidence, he is competent to prove the contents of a lost package, involved in his title and claim to relief. (U. S. v. Clark, 96 U. S. 37; but see Christian v. U. S., 7 Ct. of Cl. 431.)

Assignor and assignee.—The United States may take the deposition of the assignee of a claim, or of a person interested in the event of the suit, but it cannot be used to support a claim against the United States. (Macauley v. U. S., 11 Ct. of Cl. 575.) A

person who sold property to a claimant before its capture may testify in favor of the claimant. (Grossmeyer v. U. S., 4 Ct. of Cl. 1; Scharfer v. U. S., 4 Ct. of Cl. 529; U. S. v. Anderson, 9 Wall. 56.) If a counterclaim is filed by the United States for the breach of contract a surety on the land cannot testify. (Wood v. U. S., 10 Ct. of Cl. 395.)

§ 679. **Examination of claimant.**—The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court, and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made, and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises. (Rev. Stats. sec. 1080.)

Note.—The claimant alone can be held responsible under this section. (McCauley v. U. S., 11 Ct. of Cl. 575.) The provisions of this section shall apply to cases under the act of 24 U. S. Stats., supra. The

right of the government to examine a claimant before trial extends to Indian depredation cases; the application for an order to examine a claimant may be ex parte, and no special ground need be set forth. (Truitt's Case, 30 Ct. of Cl. 19.)

§ 680. **Testimony taken where deponent resides.**—The testimony in cases pending before the court of claims shall be taken in the county where the witness resides, when the same can be conveniently done. (Rev. Stats. sec. 1081.)

§ 681. **Witnesses, how compelled to attend.**—The court of claims may issue subpoenas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein, and such subpoenas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish. (Rev. Stats. sec. 1082.)

§ 682. **Cross-examination.**—In taking testimony to be used in support of any claim opportunity shall be given to the United States to file interrogatories, or by attorneys to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations. (Rev. Stats. sec. 1083.)

§ 683. **Witnesses, how sworn.**—The commissioner taking testimony to be used in the court of

claims shall administer an oath or affirmation to the witnesses brought before him for examination. (Rev. Stats. sec. 1084.)

§ 684. **Fees of commissioner.**—When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the government, such fees, together with all postage incurred by the assistant attorney general, shall be paid out of the contingent fund provided for the court of claims, or other appropriation made by Congress for that purpose. (Rev. Stats. sec. 1085.)

§ 685. **Claims forfeited for fraud.**—Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or of any part of any claim against the United States, shall *ipso facto* forfeit the same to the government; and it shall be the duty of the court of claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same. (Rev. Stats. sec. 1086.)

§ 686. **New trial on motion of claimant.**—When judgment is rendered against any claimant, the court may grant a new trial for any reason

which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial. (Rev. Stats. sec. 1087.)

New trial—Claimant's motion.—A motion for a new trial suspends the judgment and continues the case within the jurisdiction of the court. If the decision is founded on a mistake of law claimant may file a motion for review. (Calhoun v. U. S., 14 Ct. of Cl. 193.) So if judgment is entered on matters not properly in evidence. (Alvord v. U. S., 9 Ct. of Cl. 133.) Where there has been no oversight or misapprehension a decision must be regarded as final, unless one of the judges desires a reargument. (Fendall v. U. S., 12 Ct. of Cl. 305.) A new trial cannot be granted merely because the amount involved is too small to allow an appeal (Deeson v. U. S., 6 Ct. of Cl. 227); nor on the ground of newly discovered evidence, if it could have been discovered by the use of due diligence (Garrison v. U. S., 2 Ct. of Cl. 382; Armstrong v. U. S., 6 Ct. of Cl. 226; Deeson v. U. S., 6 Ct. of Cl. 227; Bramhall v. U. S., 3 Ct. of Cl. 238); or unless it is made to appear that a different result would probably be reached. (Garrison v. U. S., 2 Ct. of Cl. 382; Bramhall v. U. S., 6 Ct. of Cl. 238.) The mere fact that the supreme court has made decisions since the judgment that might entitle claimant to a judgment it is no ground for granting a new trial. (Bramhall v. U. S., 6 Ct. of Cl. 238.) Although claimant has no right to demand a new trial for a mistake in the findings, yet the error may be corrected while the proceedings are under control of the court. (Calhoun v. U. S., 14 Ct. of Cl. 193; Neal v. U. S., 14 Ct. of Cl. 477.) An order dismissing a petition will not be stricken out if the petition shows that there is no jurisdiction (Garcia v. U. S., 14 Ct. of Cl. 121), or that

diligence to prosecute the claim has not been used (Schuffelin v. U. S., 8 Ct. of Cl. 359; Figh v. U. S., 3 Ct. of Cl. 97); and a judgment will not generally be set aside after an intervening term. (Figh v. U. S., 3 Ct. of Cl. 97.) If the record is in possession of the court an allowance of an appeal may be stricken out and motion for new trial entertained. (Ex parte Roberts, 15 Wall. 384; but see Stern v. U. S., 6 Ct. of Cl. 280; Nutt v. U. S., 8 Ct. of Cl. 185.) Where a new trial has been granted, but it appears from the new evidence that the same result will be reached, and the same findings of fact made, the court, instead of requiring a second trial, will vacate the order allowing it. (Grantham's Case, 28 Ct. of Cl. 528.)

§ 687. New trial on motion of United States.—The court of claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law. (Rev. Stats. sec. 1088.)

New trial—Motion of government.—Injustice contemplated by this section is not that which results from mere judicial error; it must be such as is discovered after rendition of judgment. (Child v. U. S., 6 Ct. of Cl. 44.) Under this section the court of claims has power to grant a new trial, on motion on behalf of the United States, at a term subsequent to that at

which the judgment was rendered. (Belknap v. United States, 150 U. S. 588.) If a motion for new trial is filed within two years after disposition of the claim, action may be taken thereon even after that time (Bellocq v. U. S., 13 Ct. of Cl. 195); and the objection of the lapse of more than two years after entry of judgment cannot be made to a motion for a continuance. (U. S. v. Crusell, 12 Wall. 175.) The obligation to use diligence falls upon the officers of the government who are charged in law or in fact with its defense. (Silvey v. U. S., 7 Ct. of Cl. 305.) The final disposition of the suit is to date from the final termination on appeal, if appeal is taken, and if none is taken then from its final determination in the court of claims. (Ex parte Russell, 13 Wall. 664.) The mere filing of a motion for new trial is no ground for dismissing an appeal (U. S. v. Ayres, 9 Wall. 608); the case on appeal will be continued to await the decision on the motion. (U. S. v. Crusell, 12 Wall. 175.) It may be made even after filing a mandate affirming the judgment of the court of claims (Ex parte Russell, 13 Wall. 664; Ex parte United States, 16 Wall. 699); and if the new trial be granted, the appeal will be dismissed. (U. S. v. Ayres, 9 Wall. 608; U. S. v. Young, 94 U. S. 258.) A new trial will be granted if the new evidence is prima facie sufficient (Tait v. U. S., 5 Ct. of Cl. 638; Ayers v. U. S., 5 Ct. of Cl. 712; Douglass v. U. S., 11 Ct. of Cl. 655); but it will not be granted unless there was due diligence to discover the evidence (Child v. U. S., 6 Ct. of Cl. 44; Silvey v. U. S., 7 Ct. of Cl. 305); nor if the new evidence would not affect the result (Child v. U. S., 7 Ct. of Cl. 305); nor for an error of law where the party has ample remedy by appeal (Ealer v. U. S., 5 Ct. of Cl. 708); nor merely to contradict a witness upon an immaterial point. (Silvey v. U. S. 7 Ct. of Cl. 305.) The evidence authorized by this section in a motion by the govern-

ment for a new trial, includes testimony taken in the form of question and answer. (In re McKay, 30 Ct. of Cl. 1.) The court of claims has power to compel a witness to appear and testify in regard to a motion for a new trial. (In re McKay, 30 Ct. of Cl. 1.) If one motion has been denied a second motion based on the same grounds will not be considered. (Child v. U. S., 6 Ct. of Cl. 441.) The decision granting a new trial is not appealable. (Young v. U. S., 95 U. S. 641.) Where Congress directed the court of claims to rehear a claim which had been decided against on account of the informality of the papers, it intended that such court should wholly disregard such informality. (Cross v. United States, 14 Wall. 479.) Where the supreme court required the court of claims to proceed in the cause remanded, in conformity to law and justice, the court of claims may set aside the finding of facts made on the first trial, and try the case de novo. (Ex parte Medway, 23 Wall. 504.) Where the court of claims has revoked an order for the allowance of an appeal, it has power to hear, entertain, and decide a motion for a new trial. (Ex parte Roberts, 15 Wall. 384.) Public officers cannot open and re-examine claims against the government which were rejected by their predecessors in office, in the absence of fraud, mistake in matters of fact arising from errors in calculations, or of newly discovered material evidence. (Waddell v. United States, 25 Ct. of Cl. 000.) They have the right to pay into the treasury the disputed moneys, and then seek the courts to adjust and determnie their claims against their superior and sovereign. Such payment is not an estoppel against the claimant. (United States v. Mosby, 133 U. S. 273.)

§ 688. **Payment of judgments.**—In all cases of final judgments by the court of claims, or, on ap-

peal, by the supreme court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the secretary of the treasury of a copy of said judgment, certified by the clerk of the court of claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. (Rev. Stats. sec. 1089.)

Note.—The payment of a judgment of the court of claims satisfies the demand of a judgment creditor against the United States, and he is only required to enter satisfaction on receipt of the money. (U. S. v. Frerichs, 124 U. S. 315.) Where two partners recovered a joint judgment against the United States, and it paid one-half thereof to one partner, and applied the other half to a judgment in its favor against the other partner, the United States cannot be compelled to pay it over to them jointly. (Howes v. U. S., 24 Ct. of Cl. 170.)

Private claims construed.—(Sweeney v. U. S., 5 Ct. of Cl. 285.)

§ 689. **Interest.**—In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the supreme court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the secretary of the treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the secretary of the treasury as aforesaid. (Rev. Stats. sec. 1090.)

Interest on judgments.—Provision is made in this section for the payment by government of interest on its debts. (White v. Arthur, 10 Fed. Rep. 83.) Interest on judgments is not to be paid unless the United States has appealed. (White v. Arthur, 10 Fed. Rep. 87; see U. S. v. Jones, 131 U. S. 1.) The provisions of sections 1090 and 1091 of the Revised Statutes are not repealed or modified by section 10 of the act of March 3, 1887; and the latter act does not authorize the recovery of interest on judgments from the time of their rendition until an appropriation is made for their payment. (United States v. Barber, 41 U. S. App. 424; 74 Fed. Rep. 483.)

§ 690. **Interest on claims.**—No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest. (Rev. Stats. sec. 1091.)

Interest.—Unless a contract stipulates for interest, interest cannot be allowed against the United States (Tilson v. U. S., 100 U. S. 43; Todd v. U. S., Dev. Ct. Cl. 175); but it may be allowed in the court of claims if allowed by Congress in the adjustment of like cases. (U. S. v. McKee, 91 U. S. 442.) Interest may be allowed on claims against proceeds of captured and abandoned property. (Villalonga v. U. S., 23 Wall. 35.) No interest can be allowed except upon a contract expressly stipulating for interest. (Harvey v. U. S., 113 U. S. 243; Tilson v. U. S., 100 U. S. 43.)

§ 691. **Payment of judgment a full discharge, etc.**—The payment of the amount due by any judgment of the court of claims and of any interest thereon allowed by law, as hereinbefore provided, shall be a full discharge to the United

States of all claim and demand touching any of the matters involved in the controversy. (Rev. Stats. sec. 1092.)

§ 692. **Final judgment a bar.**—Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy. (Rev. Stats. sec. 1093.)

The judgments of the court of claims, where no appeal is taken to this court, are absolutely conclusive of the rights of the parties, and are not subject to revision by any one of the executive departments. (United States v. O'Grady, 22 Wall. 641.)

Final judgment.—The provisions of this section relate only to judgments on the merits (Spicer v. U. S., 5 Ct. of Cl. 34); but though erroneous a judgment is a bar to another suit (Osborn v. U. S., 19 Wall. 577); but it will not bar a subsequent suit for a different cause of action. (Shrewsbury v. U. S., 18 Wall. 664; 9 Ct. of Cl. 263.) So a judgment on one petition will not bar another petition for rent due at another time. (Cross v. U. S., 14 Wall. 479.) The judgment in an action by the holder of negotiable paper against indorsers is not a bar to a subsequent action against the maker not notified of the prior suit. (Railroad Co. v. National Bank, 102 U. S. 14; see United States v. Irwin, 127 U. S. 125.)

§ 693. **Claims, etc., pending before Congress.**—Whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either house of Congress, which in-

volves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee, or to the house by which the case was transmitted for its consideration. (22 U. S. Stats. 485, sec. 1.)

Transmission under the "Bowman Act."—Where a petitioner in Congress seeks the passage of a law which will enable him to acquire realty whereof the legal title is vested in the government, upon the payment of such sum as may be just and equitable, the matter may be transmitted to the court of claims, under the Bowman Act. (Taylor v. United States, 25 Ct. of Cl. 75.) The court has jurisdiction to find the facts in a claim for infringement of a patent referred to it by the committee on claims of the Senate. (Forehand v. United States, Ct. of Cl., 17 Wash. L. Rep. 37.) Where the primary purpose of a military order is not to supply the army, but to injure the enemy, the taking is an act of war, which gives the owners no right to relief for commissary supplies taken. (Conard v. United States, 25 Ct. of Cl. 433.) Under the Bowman Act it is the duty of the court of claims to settle the ultimate facts so that Congress may assume them as a basis for its legislative judgment and discretion, and it need not give the details. (Moore v. United States, 25 Ct. of Cl. 82.)

§ 694. Claims pending in executive departments.—When a claim or matter is pending in any

of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said court, and the same shall there be proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted, for its guidance and action. (22 U. S. Stats. 485, sec. 2.)

§ 695. **Claims not within jurisdiction of court.**—The jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or damage to property by the army or navy during the war for the suppression of the rebellion, or for the use and occupation of real estate by any part of the military or naval forces of the United States in the operations of said forces during the said war at the seat of war; nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States. (22 U. S. Stats. 485, sec. 3.)

§ 696. **Claims for supplies, etc.**—In any case of a claim for supplies or stores taken by or furnished to any part of military or naval forces of the United States for their use during the late war for the suppression of the rebellion, the petition shall

aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed. (22 U. S. Stats. 485, sec. 4.)

§ 697. **Defense, etc., for the United States.**—The attorney general, or his assistants under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the court of claims under this act, with the same power to interpose counter-claims, offsets, defenses for fraud practiced or attempted to be practiced by claimants, and other defenses, in like manner as he is now required to defend the United States in said court. (22 U. S. Stats. 485, sec. 5.)

§ 698. **Parties in interest may testify, etc.**—In the trial of such cases no person shall be excluded as a witness because he or she is a party to or interested in the same. (22 U. S. Stats. 485, sec. 6.)

§ 699. **Reports of court may be continued, etc., for action.**—Reports of the court of claims to congress under this act, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from congress to congress until the same shall be finally acted upon. (Act approved March 3, 1883. 22 U. S. Stats. 485, sec. 7.)

§ 700. **Spoliations committed by the French.**—Claimants may apply by petition to the court of claims for indemnity for detentions, seizures, condemnations, and confiscations prior to the ratification of the convention between the United States and the French republic concluded on September 30, 1800, ratified July 31, 1801, within two years from the passage of this act; *provided*, that this act shall not extend to such claims as were embraced in that convention, nor to such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain of February 22, 1819; nor to such claims as were allowed, in whole or in part, under the treaty between the United States and France of July 4, 1831. (See 23 U. S. Stats. 283, sec. 1.)

§ 701. **Court to make needful rules.**—The court is hereby authorized to make all needful rules and regulations, not contravening the laws of the land or the provisions of this act, for executing the provisions hereof. (23 U. S. Stats. 283, sec. 22.)

§ 702. **Court to determine validity, amount, ownership of claims.**—The court shall examine and determine the validity and amount of all the claims included within the description above mentioned, together with their present ownership, and if by assignee, the date of the assignment, with the consideration paid therefor; *provided*, that in the course of their proceedings they shall receive all suitable testimony on oath or affirmation, and all other proper evidence, historic and documentary, concerning the same; and they shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor. (23 U. S. Stats. 283, sec. 3.)

§ 703. **Attorney general, notice to and defense by.**—The court shall cause notice of all petitions presented under this act to be served on the attorney general of the United States, who shall be authorized, by himself or his assistant, to examine witnesses, to cause testimony to be taken, to have access to all testimony taken under this act, and to be heard by the court. He shall resist all claims presented under this act by all proper legal defenses. (23 U. S. Stats. 283, sec. 4.)

§ 704. **Evidence and documents—How procured and filed.**—It shall be the duty of the secre-

tary of state to procure, as soon as possible after the passage of this act, through the American minister at Paris, or otherwise, all such evidence and documents relating to the claims above mentioned as can be obtained from abroad; which, together with the like evidence and documents on file in the department of state, or which may be filed in the department, may be used before the court by the claimants interested therein, or by the United States, but the same shall not be removed from the files of the court; and after the hearings are closed, the record of the proceedings of the court and the documents produced before them shall be deposited in the department of state. (23 U. S. Stats. 283, sec. 5.)

§ 705. **Court to report to Congress.**—On the first Monday of December in each year the court shall report to Congress, for final action, the facts found by it, and its conclusions in all cases which it has disposed of and not previously reported. Such finding and report of the court shall be taken to be merely advisory as to the law and facts found, and shall not conclude either the claimant or Congress; and all claims not finally presented to said court within the period of two years limited by this act shall be forever barred; and nothing in this act shall be construed as committing the United States to the payment of any such claims. (Approved January 20, 1885. 23 U. S. Stats. 283, sec. 6.)

§ 706. **Indian depredations.**—In addition to

the jurisdiction which now is, or may hereafter be, conferred upon the court of claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely: all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for. (26 U. S. Stats. 851, sec. 1, cl. 1.)

Note.—The words "claims for property of citizens" means citizens at the time the property was taken. (Valk's Case, 28 Ct. of Cl. 241.) This section makes citizenship jurisdictional. (Johnson's Case, 29 Ct. of Cl. 1.) The court of claims has no jurisdiction of a claim, under this section, for consequential damages. (Brice's Case, 32 Ct. of Cl. 23.) A corporation of a State is a "citizen of the United States" within the meaning of the above section. (United States v. Northwestern Express Stage & T. Co., 164 U. S. 686.) In claims for Indian depredations, the jurisdiction of the court of claims now supersedes that of the secretary of the interior. (Jaeger's Case, 27 Ct. of Cl. 278.) The Indian depredation act is jurisdictional. The jurisdiction is commensurate with and includes all legal liabilities of Indian defendants. (Love's Case, 29 Ct. of Cl. 332.) If the property was not, when taken or destroyed, the property of a citizen, a claim therefor is clearly outside the statute, although the status of the claimant has since changed and he was a citizen at the passage of the act. (Johnson v. United States, 160 U. S. 546.)

§ 707. **Examined claims.**—Such jurisdiction shall also extend to all cases which have been examined and allowed by the interior department, and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes (approved March 3, 1885; 23 U. S. Stats. 376), and under subsequent acts, subject, however, to the limitations hereinafter provided. (26 U. S. Stats. 851, sec. 1, cl. 2.)

§ 708. **Offsets and counterclaims.**—All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination. (26 U. S. Stats. 851, sec. 1, cl. 3.)

§ 709. **Waiver of limitations.**—All questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the secretary of the interior, or other officer or department of the government; *provided*, that no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed, or has been or is pending, prior to the passage of this act, before the secretary of the interior or the Congress of the United States, or before any superintendent,

agent, subagent, or commissioner, authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein; *and provided further*, that all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter for ever barred; *and provided, further*, that no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof. (26 U. S. Stats. 851, sec. 2.)

§ 710. **Petition, etc.**—All claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved. The petition shall be verified by the affidavit of the claimant, his agent, administrator, or attorney, and shall be filed with the clerk of said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law. (26 U. S. Stats. 851, sec. 3.)

Parties in Indian cases.—In Indian depredation cases the court may bring in new Indian defendants after the statutory period for bringing such suits has expired. The court may bring in a tribe as defendant at any time before judgment. (Duran's Case, 31 Ct. of Cl. 353.)

§ 711. Service on and defense by attorney-general.—The service of the petition shall be made upon the attorney-general of the United States, in such manner as may be provided by the rules or orders of said court. It shall be the duty of the attorney-general of the United States to appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case, to file a plea, answer, or demurrer, on the part of the Government and the Indians, and to file a notice of any counterclaim, set-off, claim of damages, demand, or defense whatsoever of the Government or of the Indians in the premises: *provided*, that should the attorney-general neglect or refuse to file the plea, answer, demurrer, or defense as required, the claimant may proceed with the case under such rules as the court may adopt in the premises; but the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proofs satisfactory to the court; *provided*, that any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the ap-

proval of the commissioner of Indian affairs, if he or they shall choose so to do. (26 U. S. Stats. 851, sec. 4, cl. 1.)

Service on Indians.—The service of a petition in Indian depredation cases upon the attorney general is all that is required; the Indians are not entitled to notice. (Jaeger's Case, 27 Ct. of Cl. 278.)

Attorney for Indians.—Fee of, how allowed. (United States v. Blackfeather, 155 U. S. 180.)

Defendant's pleading.—In Indian cases the court of claims may allow the defendants to file a plea after the time prescribed by the statute, even though the legal right of the defendants to file it expires at the time fixed. (Labadie's Case, 31 Ct. of Cl. 436.) The general traverse puts in issue every allegation in the petition in an Indian depredation case. (King's Case, 31 Ct. of Cl. 304; Gamel's Case, 31 Ct. of Cl. 321.) Claimants cannot have judgment by default. (King's Case, 31 Ct. of Cl. 304.) If either party asks a severance of issues the jurisdictional issues must be tried first. (Gamel's Case, 31 Ct. of Cl. 321.

§ 712. Evidence—Priority of claims reopening cases.—In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence, and such weight given thereto as in its judgment is right and proper; *provided*, that all unpaid claims which have heretofore been examined, approved, and allowed by the secretary of the in-

terior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and subsequent Indian appropriation acts, shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses, and the documentary evidence, including reports of department agents therein, may be read as depositions and proofs; *provided*, that the party electing to reopen the case shall assume the burden of proof. (26 U. S. Stats. 851, sec. 4, cl. 2.)

Reopening case.—Where defendants have not signified their election whether they will reopen an Indian depredation case, a motion for judgment is premature. (Mitchell's Case, 27 Ct. of Cl. 316.) When an Indian depredation case is reopened, the whole case is reopened for trial de novo, subject only to the provision concerning the burden of proof. (Leighton's Case, 29 Ct. of Cl. 288.)

§ 713. **Rules for taking testimony, etc.**—The said court shall make rules and regulations for taking testimony in the causes herein provided for, by deposition or otherwise, and such testimony shall be taken in the county where the wit-

ness resides, when the same can be conveniently done, and no person shall be excluded as a witness because he is party to or interested in said suit, and any claimant or party in interest may be examined as a witness on the part of the Government; that the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified. (26 U. S. Stats. 851, sec. 5.)

§ 714. **Judgment, how paid.**—The amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence, and education; and fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment

shall be paid from the treasury of the United States; *provided*, that any amount so paid from the treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund, or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe. (26 U. S. Stats. 851, sec. 6.)

§ 715. **Judgments final—Appeal.**—All judgments of said court shall be a final determination of the causes decided, and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judgment reversed or modified upon appeal as hereafter provided. (26 U. S. Stats. 851, sec. 7.)

§ 716. **List of judgments to be sent to Congress.**—Immediately after the beginning of each session of Congress, the attorney-general of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act, in favor of claimants and against the United States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill. (26 U. S. Stats. 851, sec. 8.)

§ 717. **Assignment of claims.**—All sales, transfers, or assignments of any such claims heretofore or hereafter made, except such as have occurred in the due administration of decedents'

estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void, and all warrants issued by the secretary of the treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, executors, or administrators, or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys, and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent of such judgment shall be allowed by the court. (26 U. S. Stats. 851, sec. 9.)

Fees.—All fees are to be regulated by the court. (Tanner's Case, 32 Ct. of Cl. 192.)

§ 718. **Appeal.**—The claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceedings brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the statutes of the United States in other cases, and upon the conditions and limitations therein con-

tained. The mode of procedure in claiming and perfecting an appeal shall conform, in all respects, as near as may be, to the statutes and rules of court governing appeals in other cases. (26 U. S. Stats. 851, sec. 10.)

§ 719. **All papers, etc., to be furnished the court.**—All papers, reports, evidence, records and proceedings now on file or of record in any of the departments or the office of the secretary of the Senate, or the office of the clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act, shall be furnished to the court upon its order, or at the request of the attorney-general. (26 U. S. Stats. 851, sec. 11.)

§ 720. **Assistant attorney-general.**—To facilitate the speedy disposition of the cases herein provided for, in said court of claims, there shall be appointed, in the manner prescribed by law for the appointment of assistant attorney-generals, one additional assistant attorney-general of the United States, who shall receive a salary of twenty-five hundred dollars per annum. (26 U. S. Stats. 851, sec. 12.)

§ 721. **Investigation under present laws.**—The investigation and examinations, under the provisions of the acts of Congress heretofore in force, of Indians depredation claims, shall cease upon the taking effect of this act, and the unexpended balance of the appropriation therefor shall be

covered into the treasury, except so much thereof as may be necessary for disposing of the unfinished business pertaining to the claims now under investigation in the interior department, pending the transfer of said claims and business to the court or courts herein provided for, and for making such transfers and a record of the same, and for the proper care and custody of the papers and records relating thereto. (Approved, March 3, 1891; 26 U. S. Stats. 851, sec. 13.)

§ 722. **Court to determine claim of Pottawatomies.**—Full jurisdiction is conferred on the court of claims, subject to an appeal to the supreme court, to hear and determine the question whether or not a citizen band of Pottawatomie Indians purchased and paid the United States for the tract of country, under an agreement entered into between the United States and said band of Indians, pursuant to the Act of March 3, 1891. (See 26 U. S. Stats. 1021, sec. 12.)

§ 723. **Private claim referred.**—A claim of certain members of the Pottawatomie nation of Indians referred to the court of claims for adjudication. (Appropriation Act of March 3, 1885; 23 U. S. Stats. 372.)

(See Pam-to-Pee v. United States, 148 U. S. 691.)

CHAPTER XXV.

COURT OF PRIVATE LAND CLAIMS.

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§ 724. Court of private land claims established.—There shall be, and hereby is, established a court to be called the court of private land

claims, to consist of a chief justice and four associate justices, who shall be, when appointed, citizens and residents of some of the States of the United States, to be appointed by the President, by and with the advice and consent of the Senate, to hold their offices for the term expiring on the thirty-first day of December, Anno Domini eighteen hundred and ninety-five; any three of whom shall constitute a quorum. Said court shall have and exercise jurisdiction in the hearing and decision of private land claims according to the provisions of this Act. The chief justice and the associate justices shall each receive a compensation of five thousand dollars per year, payable monthly, and necessary traveling and personal expenses while engaged in the performance of their duties. The said court shall appoint a clerk, at a salary of two thousand dollars a year, who shall attend all the sessions of the court, and a deputy clerk, where regular terms of the court are held, at a salary of eight hundred dollars a year. The court shall appoint a stenographer, at a salary of fifteen hundred dollars a year, who shall attend all the sessions of the court and perform the duties required of him by the court. (26 U. S. Stats. 854, sec. 1, cl. 1.)

§ 725. **Powers, etc.**—The said court shall have power to adopt all necessary rules and regulations for the transaction of its business and to carry out the provisions of this act; to issue any process necessary to the transaction of the business

of said court, and to issue commissions to take depositions as provided in chapter seventeen of title thirteen of the Revised Statutes of the United States. Each of said justices shall have power to administer oaths and affirmations. It shall be the duty of the United States marshal for any district or territory in which the court is held to serve any process of the said court placed in his hands for that purpose, and to attend the court in person or by deputy when so directed by the court. The court shall hold such sessions in the States and Territories mentioned in this Act as shall be needful for the purposes thereof, and shall give notice of the times and places of the holding of such sessions, by publication in both the English and Spanish languages, in one newspaper published at the capital of such State or Territory, once a week for two successive weeks, the last of which publications shall be not less than thirty days next preceding the times of the holding of such sessions, but such sessions may be adjourned from time to time without such publication. (26 U. S. Stats. 854, sec. 1, cl. 2.)

§ 726. United States attorney, appointment.—There shall also be appointed by the President, by and with the advice and consent of the Senate, a competent attorney, learned in the law, who shall when appointed be a resident and citizen of some State of the United States, to represent the United States in said court. Such attorney shall receive a compensation of three thousand five

hundred dollars per year, payable monthly, and his necessary traveling and personal expenses while engaged in the discharge of his duties. And there shall be appointed by the said court a person who shall be when appointed a citizen and resident of some State of the United States, skilled in the Spanish and English languages, to act as interpreter and translator in said court, to attend all the sessions thereof, and to perform such other service as may be required of him by the court. Such person shall be entitled to a compensation of one thousand five hundred dollars per year, payable monthly, and his necessary traveling and personal expenses while engaged in the discharge of his duties. (26 U. S. Stats. 855, sec. 2.)

§ 727. **Notice of organization of court.**—Immediately upon the organization of said court, the clerk shall cause notices thereof, and of the time and place of the first session thereof, to be published for a period of ninety days in one newspaper at the city of Washington and in one published at the capital of the State of Colorado and of the Territories of Arizona and New Mexico. Such notices shall be published in both the Spanish and English languages, and shall contain the substance of this Act. (26 U. S. Stats. 855, sec. 3.)

§ 728. **Production of records, etc.**—It shall be the duty of the commissioner of the general land-office of the United States, the surveyors-general

of such Territories and States, or the keeper of any public records who may have possession of any records and papers relating to any land grants or claims for land within said States and Territories in relation to which any petition shall be brought under this Act, on the application of any person interested, or by the attorney of the United States, to safely transmit such records and papers to said court or to attend in person or by deputy any session thereof, when required by said court, and produce such records and papers. (26 U. S. Stats. 856, sec. 4.)

§ 729. Competence, etc., of evidence as to claims.—The testimony which has been heretofore lawfully and regularly received by the surveyor-general of the proper Territory or State, or by the commissioner of the general landoffice, upon any claims presented to them, respectively, shall be admitted in evidence in all trials under this Act when the person testifying is dead, so far as the subject-matter thereof is competent evidence, and the court shall give it such weight as, in its judgment, under all the circumstances, it ought to have. (U. S. Stats. 856, sec. 5.)

§ 730. Claimants under unconfirmed grants.—It shall and may be lawful for any person or persons, or corporation, or their legal representatives, claiming lands within the limits of the Territory derived by the United States from the republic of Mexico, and now embraced within the Terri-

tories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of the passage of this Act have not been confirmed by Act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition, in writing, to the said court in the State or Territory where said land is situated and where the said court holds its sessions, but cases arising in the States and Territories in which the court does not hold regular sessions may be instituted at such place as may be designated by the rules of the court. (26 U. S. Stats. 856, sec. 6, cl. 1.)

§ 731. **Form of petition.**—The petition shall set forth fully the nature of their claims to the lands, and particularly state the date and form of the grant, concession, warrant, or order of survey under which they claim, by whom made, the name or names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioner; and also the quantity of land claimed and the boundaries thereof, where situate, with a map showing the same, as near as may be, and whether the said claim has heretofore been con-

firmed, considered, or acted upon by Congress or the authorities of the United States, or been heretofore submitted to any authorities constituted by law for the adjustment of land titles within the limits of the said Territory so acquired, and by them reported on unfavorably or recommended for confirmation, or authorized to be surveyed or not; and pray in such petition that the validity of such title or claim may be inquired into and decided. (26 U. S. Stats. 856, sec. 6, cl. 2.)

§ 732. **Jurisdiction, etc.— Procedure.** — And the said court is hereby authorized and required to take and exercise jurisdiction of all cases or claims presented by petition in conformity with the provisions of this Act, and to hear and determine the same, as in this act provided, on the petition and proofs in case no answer or answers be filed after due notice, or on the petition, and the answer or answers of any person or persons interested in preventing any claim from being established, and the answer of the attorney for the United States where he may have filed an answer, and such testimony and proofs as may be taken; and a copy of such petition, with a citation to any adverse possessor or claimant, shall, immediately after the filing of the same, be served on such possessor or claimant in the ordinary legal manner of serving such process in the proper State or Territory, and in like manner on the attorney for the United States; and it shall be the duty of the

attorney for the United States, as also any adverse possessor or claimant, after service of petition and citation as hereinbefore provided, within thirty days, unless further time shall, for good cause shown, be granted by the court, or a judge thereof, to enter an appearance, and plead, answer, or demur to said petition; and in default of such plea, answer, or demurrer being made within said thirty days, or within the further time which may have been granted as aforesaid, the court shall proceed to hear the cause on the petition and proofs, and render a final decree according to the provisions of this Act, and in no case shall a decree be entered otherwise than upon full legal proof and hearing; and in every case the court shall require the petition to be sustained by satisfactory proofs, whether an answer or plea shall have been filed or not. (26 U. S. Stats. 856, sec. 6, cl. 3.)

Jurisdiction of court of private land claims.—A case presented for adjudication to the court of private land claims must be clearly within the act of Congress creating such tribunal or relief cannot be given. (United States v. Sandoval, 167 U. S. 278.) The court cannot adjudge in favor of the validity of a grant unless satisfied by the evidence of the authority of the granting officer or body to convey the public domain, or that the exercise of that power if unwarranted, was subsequently lawfully ratified. (Hayes v. United States, 170 U. S. 637.)

§ 733. **Proceedings after petition — Powers, etc.**—All proceedings subsequent to the filing of

said petition shall be conducted as near as may be according to the practice of the courts of equity of the United State, except that the answer of the attorney of the United States shall not be required to be verified by his oath, and except that, as far as practicable, testimony shall be taken in court or before one of the justices thereof. The said court shall have full power and authority to hear and determine all questions arising in cases before it relative to the title to the land, the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the republic of Mexico at the city of Guadalupe-Hidalgo, on the second day of February, in the year of our Lord eighteen hundred and forty-eight, or the treaty concluded between the same powers at the city of Mexico on the thirtieth day of December, in the year of our Lord eighteen hundred and fifty-three, and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States, which decree shall in all cases refer to the treaty, law, or ordinance under which such claim is confirmed or rejected; and in confirming any such

claim, in whole or in part, the court shall in its decree specify plainly the location, boundaries, and area of the land the claim to which is so confirmed. (26 U. S. Stats. 857, sec. 7.)

§ 734. **Application by other claimants.**—Any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican Government, that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location, and boundaries, in the same manner and with the same powers as in other cases in this act mentioned. (26 U. S. Stats. 857, sec. 8, cl. 1.)

§ 735. **Confirmation of perfect title, limited.**—If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of

claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby. (26 U. S. Stats. 857, sec. 8, cl. 2.)

§ 736. **Proceedings by the United States against certain claimants, etc.**—It shall be lawful for and the duty of the head of the department of justice, whenever in his opinion the public interest or the rights of any claimant shall require it, to cause the attorney of the United States in said court to file in said court a petition against the holder or possessor of any claim or land in any of the States or Territories mentioned in this act who shall not have voluntarily come in under the provisions of this act, stating in substance that the title of such holder or possessor is open to question, or stating in substance that the boundaries of any such land, the claimant or possessor to or of which has not brought the matter into court, are open to question, and praying that the title to any such land, or the boundaries thereof, if the title be admitted, be settled and adjudicated; and thereupon the court shall, on such notice to such claimant or possessor as it shall deem reasonable, proceed to hear, try, and determine the questions stated in such petition or arising in the matter, and determine the matter according to law, justice, and the provisions of this act, but subject to all

lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the provisions of this section applicable thereto.. (26 U. S. Stats. 858, sec. 8, cl. 3.)

§ 737. **Appeal—Retrial by supreme court.**—The party against whom the court shall in any case decide—the United States, in case of the confirmation of a claim in whole or in part, and the claimant, in case of the rejection of a claim in whole or in part—shall have the right of appeal to the supreme court of the United States, such appeal to be taken within six months from date of such decision, and in all respects to be taken in the same manner and upon the same conditions, except in respect of the amount in controversy, as is now provided by law for the taking of appeals from decisions of the circuit courts of the United States. On any such appeal the supreme court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open, and the decision of the supreme court thereon shall be final and conclusive. Should no appeal be taken as aforesaid, the decree of the court below shall be final and conclusive. (26 U. S. Stats. 858, sec. 9, cl. 1.)

§ 738. **Notice to attorney general of confirmation—Appeal.**—Upon the rendition of any judg-

ment of the court confirming any claim, it shall be the duty of the attorney of the United States to notify the attorney general, in writing, of such judgment, giving him a clear statement of the case and the points decided by the court, which statement shall be verified by the certificate of the presiding judge of said court; and in any case in which such statement shall not be received by the attorney general within sixty days next after the rendition of such judgment, the right of appeal on the part of the United States shall continue to exist until six months next after the receipt of such statement. And if the attorney general shall so direct, it shall be the duty of the clerk of the court to transmit the record of any cause in which final judgment has been rendered to the attorney general for his examination. In all cases it shall be the duty of the attorney general to instruct the attorney for the United States what further course to pursue, and whether or not an appeal shall be taken. (26 U. S. Stats. 858, sec. 9, cl. 2.)

§ 739. **Certificate of final decree of confirmation.**—Whenever any decision of confirmation shall become final, the clerk of the court in which the final decision shall be had shall certify that fact to the commissioner of the general land office, with a copy of the decree of confirmation, which shall plainly state the location, boundaries, and area of the tract confirmed. The said commissioner shall thereupon, without delay, cause the tract so confirmed to be surveyed at the cost of the

United States. When any such survey shall have been made and returned to the surveyor general of the respective Territory or State, and the plat thereof completed, the surveyor general shall give notice that same has been done, by publication once a week, for four consecutive weeks, in two newspapers, one published at the capital of the Territory or State, and the other (if any such there be) published near the land so surveyed, such notices to be published in both the Spanish and English languages; and the surveyor general shall retain such survey and plat in his office for public inspection for the full period of ninety days from the date of the first publication of notice in the newspaper published at the capital of the Territory or State. (26 U. S. Stats. 858, sec. 10, cl. 1.)

§ 740. **Approval and forwarding to general landoffice.**—If, at the expiration of such period, no objection to such survey shall have been filed with him, he shall approve the same and forward it to the commissioner of the general landoffice. If, within the said period of ninety days, objections are made to such survey, either by any party claiming an interest in the confirmation or by any party claiming an interest in the tract embraced in the survey or any part thereof, such objection shall be reduced to writing, stating distinctly the interest of the objector and the grounds of his objection, and signed by him or his attorney, and filed with the surveyor general, with such affidavits or other proofs as he may produce in support of his objec-

tion. At the expiration of the said ninety days the surveyor general shall forward such survey, with the objections and proofs filed in support of or in opposition to such objections, and his report thereon, to the commissioner of the general land office. (26 U. S. Stats. 859, sec. 10, cl. 2.)

§ 741. **Transmission of survey, etc., to court of final decision—Approval.**—Immediately upon receipt of any such survey, with or without objections thereto, the said commissioner shall transmit the same, with all accompanying papers, to the court in which the final decision was made, for its examination of the survey and of any objections and proofs that may have been filed or shall be furnished; and the said court shall thereupon determine if the said survey is in substantial accordance with the decree of confirmation. If found to be correct, the court shall direct its clerk to indorse upon the face of the plat its approval. If found to be incorrect, the court shall return the same for correction in such particulars as it shall direct. When any survey is finally approved by the court, it shall be returned to the commissioner of the general landoffice, who shall, as soon as may be, cause a patent to be issued thereon to the confirmee. One-half of the necessary expenses of making the survey and plat provided for in this section, and in respect of which a patent shall be ordered to be issued, shall be paid by the claimant or patentee, and shall be a lien on said land, which may be enforced by the sale of so much thereof as

may be necessary for that purpose, after a default of payment thereof for six months next after the approval of such survey and plat; and no patent shall issue until such payment. (26 U. S. Stats. 859, sec. 10, cl. 3.)

§ 742. **Scope of act as to claims.**—The provisions of this act shall extend to any city lot, town lot, village lot, farm lot, or pasture lot claimed directly or mediately under any grant which may be entitled to confirmation by the United States, for the establishment of a city, town, or village by the Spanish or Mexican government, or the lawful authorities thereof; but the claim for said city, town, or village shall be presented by the corporate authorities of the said city, town, or village; or where the land upon which said city, town, or village is situated was originally granted to an individual, the claim shall be presented by or in the name of said individual or his legal representatives. (26 U. S. Stats. 859, sec. 11.)

§ 743. **Neglect to file petition in two years a bar.**—All claims mentioned in section six of this act which are, by the provisions of this act, authorized to be prosecuted, shall, at the end of two years from the taking effect of this act, if no petition in respect to the same shall have then been filed as hereinbefore provided, be deemed and taken, in all courts and elsewhere, to be abandoned, and shall be forever barred; *provided*, that in any case where

it shall come to the knowledge of the court that minors, married women, or persons *non compos mentis* are interested in any land claim or matter brought before the court, it shall be its duty to appoint a guardian *ad litem* for such persons under disability and require a petition to be filed in their behalf, as in other cases, and, if necessary, to appoint counsel for the protection of their rights. The judges, respectively, of said court are hereby authorized in all cases arising under this act to grant in vacation all orders for taking testimony, and otherwise to hear and dispose of interlocutory motions not affecting the substantial merits of a case. And said court shall have and possess all the powers of a circuit court of the United States in preserving order, compelling the production of books, papers, and documents, the attendance of witnesses, and in punishing contempts. (26 U. S. Stats. 859, sec. 12.)

§ 744. **Limitations of right to proceed.**—All the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act, namely:

§ 745. **No claim allowed unless title lawfully and regularly derived, etc.**—No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the States of the republic of Mexico having lawful authority to

make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect. (26 U. S. Stats. 860, sec. 13, cl. 1.)

§ 746. **No claim allowed interfering with Indian title, etc.**—No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place. (26 U. S. Stats. 860, sec. 13, cl. 2.)

§ 747. **No confirmation to mines or minerals.**—No allowance or confirmation of any claim shall confer any right or title to any gold, silver, or quicksilver mines or minerals of the same, unless the grant claimed effected the donation or sale of such mines or minerals to the grantee, or unless such grantee has become otherwise entitled thereto in law or in equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act. But no such mine shall be worked on any property confirmed under this act without the consent of the owner of such property until specially

authorized thereto by an act of Congress hereafter passed. (26 U. S. Stats. 860, sec. 13, cl. 3.)

§ 748. **Right hitherto decided by Congress, etc.**—No claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress, or under its authority. (26 U. S. Stats. 860, sec. 13, cl. 4.)

§ 749. **Private rights of persons between each other.**—No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands. (26 U. S. Stats. 860, sec. 13, cl. 5.)

§ 750. **Operation of decree as against United States.**—No confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed, nor shall it operate to make the United States in any manner liable in respect of any such grants, claims, or lands, or their disposition, otherwise than as is in this act provided. (26 U. S. Stats. 860, sec. 13, cl. 6.)

§ 751. **No confirmation, etc., for more than eleven square leagues.**—No confirmation in re-

spect of any claims or lands mentioned in section six of this act, or in respect of any claim or title that was not complete and perfect at the time of the transfer of sovereignty of the United States as referred to in this act, shall in any case be made or patent issued for a greater quantity than eleven square leagues of land to or in the right of any one original grantee or claimant, or in the right of any one original grant to two or more persons jointly, nor for a greater quantity than was authorized by the respective laws of Spain or Mexico applicable to the claim. (26 U. S. Stats. 861, sec. 13, cl. 7.)

§ 752. **Conditional grants, etc., barred if conditions unperformed.**—No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land. (26 U. S. Stats. 861, sec. 13, cl. 8.)

§ 753. **Lands decreed to claimant, but granted, etc., by United States to another.**—If, in any case, it shall appear that the lands, or any part thereof, decreed to any claimant under the provisions of this act, shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon

proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found, shall be a charge on the treasury of the United States. Either party deeming himself aggrieved by such judgment may appeal in the same manner as provided herein in cases of confirmation of a Spanish or Mexican grant. For the purpose of ascertaining the value and amount of such lands, surveys may be ordered by the court, and proof taken before the court, or by a commissioner appointed for that purpose by the court. (26 U. S. Stats. 861, sec. 14.)

§ 754. Ascertainment and report on Spanish and Mexican claims.—Section eight of the act of Congress, approved July 22, 1854, entitled "An act to establish the offices of surveyor general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes," and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act, are hereby repealed. (26 U. S. Stats. 861, sec. 15.)

§ 755. Adverse possession for twenty years.—In township surveys hereafter to be made in the

Territories of New Mexico, Arizona, and Utah, and in the States of Colorado, Nevada, and Wyoming, if it shall be made to appear to the satisfaction of the deputy surveyor making such survey that any person has, through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous adverse actual *bona fide* possession of any tract of land, or in connection therewith of other lands, altogether not exceeding one hundred and sixty acres in such township for twenty years next preceding the time of making such survey, the deputy surveyor shall recognize and establish the lines of such possession and make the subdivision of the adjoining lands in accordance therewith. Such possession shall be accurately defined in the fieldnotes of the survey and delineated on the township plat, with the boundaries and area of the tract as a separate legal subdivision. The deputy surveyor shall return with his survey the name or names of all persons so found to be in possession, with a proper description of the tract in the possession of each as shown by the survey, and the proofs furnished to him of such possession. (26 U. S. Stats. 861, sec. 16, cl. 1; as amended 27 U. S. Stats. 471.)

§ 756. **Review by commissioner of general landoffice—Issue of patents.**—Upon receipt of such survey and proofs, the commissioner of the general landoffice shall cause careful investigation to be made in such manner as he shall deem necessary for the ascertainment of the truth in respect

of such claim and occupation, and if satisfied upon such investigation that the claimant comes within the provisions of this section, he shall cause patents to be issued to the parties so found to be in possession for the tracts respectively claimed by them; *provided, however,* that no person shall be entitled to confirmation of, or to patent for, more than one hundred and sixty acres in his own right by virtue of this section; *and provided further,* that this section shall not apply to any city lot, town lot, village lot, farm lot, or pasture lot held under a grant from any corporation or town, the claim to which may fall within the provisions of section eleven of this act. (26 U. S. Stats. 861, sec. 16, cl. 2.)

§ 757. **Where township surveys already made.** —In the case of townships heretofore surveyed in the Territories of New Mexico, Arizona, and Utah, and the States of Colorado, Nevada, and Wyoming, all persons who, or whose ancestors, grantors, or their lawful successors in title or possession, became citizens of the United States by reason of the treaty of Guadalupe-Hidalgo (or the terms of the Gadsden purchase), and who have been in the actual continuous adverse possession of tracts of not to exceed one hundred and sixty acres each, for twenty years next preceding such survey, shall be entitled, upon making proof of such facts to the satisfaction of the register and receiver of the proper land district, and of the commissioner of the general landoffice upon such investigation as is

provided for in section sixteen of this act, to enter without payment of purchase money, fees, or commissions, such legal subdivisions, not exceeding one hundred and sixty acres, as shall include their said possessions. After a claim of the character described shall have been filed as directed in section eighteen of this act, and it shall appear that a tract claimed as aforesaid is of such shape that the claimant cannot readily secure his interests by an entry by legal subdivisions of the public surveys, the commissioner of the general landoffice may cause such claim to be surveyed at the expense of the United States, but the deputy surveyor performing the work shall not be paid for his services more than five dollars per day in addition to his necessary expenses. Before commencing such a survey the deputy surveyor shall post in at least three prominent places in the township in which such claim is situated a notice in both the English and Spanish languages, calling on all persons entitled to lands in said township under this section to submit to him, within a reasonable time, proofs of their rights in the lands by affidavit or otherwise. He shall then proceed to establish the lines of such possessions in the township as seem to him to be valid, properly connecting the lines thereof with the lines of public surveys, and he shall return the aforesaid proofs to the surveyor general with the fieldnotes of such claims and possessions. The surveyor general shall then, upon his approval of said proofs and fieldnotes of surveys, cause the said claim or claims to be platted, and numbered

as a lot or lots of the section or sections in which such claim or claims are situated, and shall transmit a duplicate of the amended plat to the general land office and a triplicate thereof to the proper district landoffice, after which the land claimed as aforesaid may be entered as a lot or lots by the number or numbers designated upon the amended township plat; *provided, however,* that no person shall be entitled to enter more than one hundred and sixty acres in one or more tracts in his own rights under the provisions of this section. (26 U. S. Stats. 862; sec. 17, as amended, 27 U. S. Stats. 471.)

§ 758. **Filing of claims under adverse possession.**—All claims arising under either of the two next preceding sections of this act shall be filed with the surveyor general of the proper State or Territory, before the fourth day of March, nineteen hundred and one, and no claim not so filed shall be valid. And the class of cases provided for in said two next preceding sections shall not be considered or adjudicated by the court created by this act, and no tract of such land shall be subject to entry under the land laws of the United States. (26 U. S. Stats. 862, sec. 18; as amended 27 U. S. Stats. 471, and 30 U. S. Stats. 495.)

§ 759. **Cessation, etc., of functions, etc., of court.**—The powers and functions of the court established by this act shall cease and determine on the fourth day of March, eighteen hundred and

ninety-nine, and all papers, files, and records in the possession of said court belonging to any other public office of the United States shall be returned to such office, and all other papers, files, and records in the possession of or appertaining to said court shall be returned to and filed in the department of the interior. (Approved March 3, 1891: 26 U. S. Stats. 862, sec. 19; as amended 29 U. S. Stats. 577.)

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